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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 GEOFFREY OSBERG,

4 Plaintiff,

5 v.

07 Civ. 1358 (KBF)

6 FOOT LOCKER, INC. et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
July 21, 2015
10 9:00 a.m.

11 Before:

12 HON. KATHERINE B. FORREST

13 District Judge

14 APPEARANCES

15 GOTTESDIENER LAW FIRM, PLLC
Attorneys for Plaintiff
16 BY: ELI GOTTESDIENER
STEVEN COHEN
ALBERT HUANG

17 PROSKAUER ROSE LLP
18 Attorneys for Defendants
BY: MYRON D. RUMELD
19 ROBERT RACHAL
20 JOSEPH E. CLARK

21 ALSO PRESENT:
Jon Int-Hout, Trial Technology Specialist
22 Randall Carter, Trial Technology Consultant

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(Trial resumes)

(In open court)

THE COURT: Good morning.

OK, folks. We are going to get going with the next witness. I just want to let you folks know that I have a new criminal case that I have to arraign at 12:30. I'm sorry. I have to arraign the criminal case at 1:30. That is the only time that counsel is I think available. I had a sentencing scheduled from one to two, which now I have to move back a half hour. We have to break today for lunch at 12:30 so I can do the sentencing followed by the arraignment.

We will be ready to pick up again at 2 o'clock on time. But it is an earlier break than otherwise I would have had. So plan for that, if you could.

Mr. Gottesdiener, would you like to call your next witness.

MR. GOTTESDIENER: Ms. Ine, your Honor.

THE COURT: Ms. Ine, please.

MR. RUMELD: Your Honor, I apologize, she just stepped out for a moment.

THE COURT: All right.

LINDA J. INE,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE COURT: Ms. Ine, please be seated. It will be

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1 very important that you pull your chair in and speak directly
2 into the microphone.

3 Could people just maybe remove -- there is so much
4 stuff here now at the witness table. Maybe all of it should be
5 taken away, reorganized back there somehow, and then just what
6 the witness needs up here. Why don't you folks come and do
7 that.

8 MR. RUMELD: That is what I was about to do, your
9 Honor.

10 THE COURT: Terrific.

11 MR. RUMELD: This is the signed declaration.

12 THE COURT: We have two binders, four piles, and a
13 partridge in a pear tree.

14 That binder has your declaration in it.

15 The first thing, Ms. Ine, I am going to do is ask you
16 to open up that binder, make sure that that declaration is, in
17 fact, the declaration which you have submitted in this matter
18 as your direct trial testimony.

19 Let me know when you've confirmed that fact.

20 THE WITNESS: Yes, it is.

21 THE COURT: Do you swear to the truth of the contents
22 of that declaration?

23 THE WITNESS: I do.

24 THE COURT: Thank you. The Court does accept the
25 declaration of Ms. Ine as her direct testimony, and the witness

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Ine - cross

1 is turned over for cross-examination.

2 Mr. Gottesdiener, you may proceed, sir.

3 CROSS EXAMINATION

4 BY MR. GOTTESDIENER:

5 Q. Good morning, Ms. Ine.

6 A. Good morning.

7 Q. You were the corporate benefits manager in the Milwaukee
8 Human Resources Operations Center?

9 A. Correct.

10 Q. You held that position for how many years, ma'am?

11 A. Almost 20.

12 Q. And the period that you were employed by Woolworth, you
13 started what year?

14 A. 1979.

15 Q. You left in '99?

16 A. Correct.

17 Q. The change to the pension plan occurred in the fall of '95
18 and was implemented in '96?

19 A. Correct.

20 Q. You were responsible for overseeing the implementation of
21 the plan change?

22 A. Administratively, yes.

23 Q. Administratively. You didn't have any actuarial training
24 yourself, right?

25 A. Correct.

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Ine - cross

1 Q. You were reasonably good with math, but you hadn't taken
2 any special courses or gotten any special instruction from
3 actuaries?

4 A. Other than what I would have discussed with the actuary
5 that was for the company.

6 Q. When you did discuss things with the actuary for the
7 company, it's fair to say that he didn't speak very simply or
8 clearly to you?

9 A. Clearly enough that I could understand.

10 Q. You thought you could understand what he was saying?

11 A. I felt, yes, that I did know what he was saying.

12 Q. You felt that way?

13 A. Yes.

14 Q. Didn't you in your deposition say that -- first of all,
15 didn't you call the actuary -- first of all, we are talking
16 about Jim Grefig from Mercer, correct?

17 A. Correct.

18 Q. Didn't you say that in meetings that you were in with him
19 that he would go off on mathematical tangents that you could
20 not follow what he was saying?

21 A. That is true.

22 Q. You had to know how the mechanics of the calculations would
23 be done, correct?

24 A. Correct.

25 Q. And supervise people who would do the mechanics of the

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1 calculations, is that fair?

2 A. Correct.

3 Q. But you did not yourself understand at the time the cash
4 balance amendment went into effect that its impact was to stop
5 benefit accruals for a period of time, did you?

6 A. No.

7 MR. GOTTESDIENER: If we could get on the screen the
8 September '95 announcement letter, PX 2.

9 BY MR. GOTTESDIENER:

10 Q. Do you remember this announcement letter that went out to
11 all participants where Mr. Farah and Mr. Hilpert explained that
12 they were excited to announce changes to the plan?

13 A. Yes, I do.

14 Q. They said that participants would be able to see their
15 individual account balance grow each year and know its value?

16 A. Correct.

17 Q. You read that when that came out?

18 A. Yes, I did.

19 Q. That was followed by PX 4, the November 1995 highlights
20 memo, and you read that as well when it came out?

21 A. Yes, I did.

22 Q. That memo first looped in the letter from Mr. Farah and
23 Mr. Hilpert and said, as previously announced by them, we are
24 going to be making some changes, and you read at the time in
25 the second paragraph, Currently your benefit under the plan is

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1 expressed as an annual annuity payable at your normal
2 retirement date. Effective January 1, 1996 your benefit will
3 be expressed as an account balance at termination of
4 employment. Provided you are vested, you will have the option
5 of taking a lump sum payment equal to your account balance.

6 You read that at the time?

7 A. Yes.

8 Q. You worked with participants both in the operations center,
9 but participants who were in contact with the operations center
10 on a daily basis, is that fair?

11 A. Correct.

12 Q. You came to have what you considered a good understanding
13 of what the average Woolworth participant understood?

14 A. Could you restate that.

15 Q. That's fair. You came to understand what you thought the
16 average participant's capabilities were in terms of
17 understanding complex pension matters?

18 A. I felt that, yes.

19 Q. You felt that essentially in order to have a connection
20 with a participant and make them understand something if they
21 had a question, you and your team had to assume that they
22 basically had an eighth-grade level of education?

23 A. That was a procedural understanding, yes.

24 Q. That was based on experience with them?

25 A. Correct.

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1 Q. A lot of times when participants contacted your center,
2 your team was essentially just on a human level rereading
3 materials that these people actually already had in their
4 possession and speaking to them slowly?

5 A. Yes, in some cases.

6 Q. It was your view that a lot of the material that was sent
7 out was legalese?

8 A. Based on what we felt they understood at an eighth-grade
9 level.

10 Q. And based on their reaction to the materials?

11 A. Correct.

12 Q. You believed that the average participant would take from
13 these announcements, the two we have just been talking about,
14 that they would assume that their benefits were merely changing
15 form and then were picking up where they left off and
16 continuing going forward?

17 MR. RUMELD: Objection.

18 THE COURT: Hold on.

19 Overruled, you may answer.

20 A. I don't know if they assumed that.

21 Q. Well, you thought that the average participant would expect
22 just what the materials say, that they would assume that it was
23 picking up where it left off and just continuing forward?

24 A. I think that they saw that there would be a new way of
25 calculating a cash balance account and that they would get

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1 increases over time to the cash balance account.

2 MR. GOTTESDIENER: Page 130, line 8.

3 THE COURT: Of Ms. Ine's deposition?

4 MR. GOTTESDIENER: Yes.

5 THE COURT: Just so the record is clear. Otherwise we
6 won't know where we are going.

7 MR. GOTTESDIENER: The transcript.

8 THE COURT: All right.

9 BY MR. GOTTESDIENER:

10 "Q. How do you think the average participant would understand
11 that statement made to them?

12 "A. I think the average participant would expect just what it
13 says. I think they would assume that it was picking up where
14 it left off and just continuing forward."

15 You gave that testimony correct?

16 A. Yes, I did.

17 Q. Is there anything in the announcement letter that you would
18 think would cause an average participant to think that there
19 was any kind of slowdown in the growth of their retirement
20 benefit?

21 A. Based on the Roger Farah announcement?

22 Q. Yes.

23 A. No. It said they that they would go to an account balance
24 and that it would grow in value.

25 Q. So that's how you think the average participant would

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1 interpret it, right?

2 A. Yes.

3 Q. And that's how you yourself interpreted it, correct?

4 A. It was true. They did go into an account balance, and they
5 did get pay credits, and they did get interest.

6 Q. Page 131, line 17:

7 "Q. And there's nothing in here that you would think would
8 cause an average participant and didn't cause you to think that
9 there was any kind of --

10 "A. No.

11 "Q. -- slowdown in the growth of your retirement benefit?

12 "A. Right. I wouldn't have thought that, no.

13 "Q. And you didn't think that?

14 "A. I didn't think that."

15 MR. RUMELD: Objection.

16 "Q. You thought that your retirement benefits were growing at
17 least as much as they had been before?

18 "A. Yes."

19 You gave that testimony, didn't you?

20 MR. RUMELD: Objection, your Honor.

21 THE COURT: I will allow it?

22 A. Yes, that is what I said.

23 Q. And you were a participant yourself in the plan, correct?

24 A. Yes, I was.

25 Q. When you read these letters, the Roger Farah letter and the

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1 highlights memo, you thought this meant that you would be
2 picking up where you left off in the old plan and moving
3 forward and earning a better benefit, didn't you?

4 A. Based on how they brought the 12/30/95 accrual into a
5 startup number for '96, which was basically converting an
6 annuity that was for the future to something for the present,
7 yes. I thought it would be equivalent, just in different
8 terms.

9 Q. So I think I have your answer, but just so there is
10 clarity. My question was, you thought yourself that you would
11 be picking up where you left off in the old plan and moving
12 forward and earning a better benefit, correct?

13 MR. RUMELD: Objection.

14 THE COURT: Overruled.

15 A. I don't know if it would be better, but I did believe that
16 it would be growing.

17 Q. Thank you. I think you will recall -- we've met before?

18 A. Right.

19 Q. Three and a half years ago?

20 A. Right.

21 Q. I told you in the deposition, when we were almost done with
22 it or towards the end of it, that we had done the math and that
23 it turned out that the cash balance amendment the way it was
24 done most people didn't earn any benefits for many years.

25 Do you remember when I informed you of that?

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1 A. Yes.

2 MR. RUMELD: Objection, your Honor.

3 MR. GOTTESDIENER: That was something --

4 THE COURT: I will allow it. He's just trying to
5 short circumstance it.

6 Go ahead.

7 BY MR. GOTTESDIENER:

8 Q. That was something that you didn't know before I informed
9 you of that fact, correct?

10 A. I'm sorry. Can you rephrase that.

11 Q. I informed you in the deposition that most people didn't
12 earn any benefits for many years, across the whole population,
13 correct?

14 A. Correct.

15 Q. I informed you of that in the deposition, right?

16 A. Correct.

17 Q. You didn't know that before I informed you of that,
18 correct?

19 A. That is correct.

20 Q. I also informed you that we had run the numbers for your
21 benefit and that it turned out that you didn't earn a dollar of
22 new pension benefits for the three years that you worked after
23 the amendment went into effect between 1/1/96 and February
24 1999.

25 A. Correct.

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Ine - cross

1 Q. You didn't know that before I informed you of it, correct?

2 MR. RUMELD: Objection, your Honor. He's
3 mischaracterizing the testimony.

4 THE COURT: She can answer. And if she doesn't agree
5 with it she will tell us.

6 You may answer.

7 A. I'm sorry?

8 Q. You didn't know that you didn't earn any new pension
9 benefits until I informed you of that fact, correct?

10 A. I must have been confused at the time because I knew I was
11 getting the lump sum from the old accrual.

12 Q. You were very surprised when I informed you that you had
13 not earned a dollar of new pension benefits for the three years
14 from the amendment to February '99, correct?

15 A. I don't remember that.

16 Q. You were not aware until I told you that you were
17 personally a victim of a pension freeze and you did not earn a
18 single new pension dollar between '96 and '99, correct?

19 A. I knew before I left because I calculated what I would get.
20 So I knew that I would get a benefit based on the old accrual.
21 And the rules also said that I would never get less than what I
22 had in the 12/30/95 accrual.

23 MR. GOTTESDIENER: Can we play the clip, transcript
24 page 200, line 21 to transcript page 201, line 3, please.

25 (The following was played:

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1 "Q. So sitting here now, I take it that you're not aware based
2 on everything you've said that you actually yourself were a
3 victim of this freeze and you didn't earn a single new pension
4 dollar between the conversion and your cashout date in February
5 of 1999?

6 "MS. DePIETTO: Objection. Form.

7 "A. That's true.")

8 BY MR. GOTTESDIENER:

9 Q. You gave that testimony, correct?

10 A. Yes.

11 Q. At your deposition in 2012 it was news to you that the
12 account growth that you thought had been pension growth was
13 actually not pension growth, correct?

14 A. It was pension growth, but --

15 Q. I'm sorry. I'm asking a question about 2012.

16 A. It was pension growth, but it wasn't enough to qualify me
17 for the cash balance amount. It was -- I received the money
18 based on 12/30/95.

19 MR. GOTTESDIENER: Page 202 line 8:

20 "Q. But you said -- you were saying that you thought you
21 were -- that this was all pension growth and it wasn't.

22 "A. True.

23 "Q. So this is news to you?

24 "A. This is true."

25 BY MR. GOTTESDIENER:

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Ine - cross

1 Q. You gave that testimony, correct?

2 A. Yes.

3 Q. I told you in the deposition that I felt bad that I had to
4 break the news to you, that you shouldn't feel bad because the
5 freeze had been effectively disguised in complicated actuarial
6 concepts, and you agreed, correct?

7 A. Yes.

8 Q. As far as you know, no participant knew that their benefit
9 wasn't growing while their account balance was growing,
10 correct?

11 MR. RUMELD: Objection.

12 THE COURT: Overruled.

13 A. Yes.

14 Q. Meaning you agree?

15 A. Yes, I do.

16 Q. You never heard any expressed concern that the conversion
17 was going to mean people's benefits weren't going to grow for a
18 while, correct?

19 A. I'm sorry. Can you say that again?

20 Q. Sure. It is just a follow-on to the prior question.

21 You didn't hear from anyone that people had figured
22 out or thought or suspected that their benefits were not going
23 to be growing for a time after 1996, correct?

24 A. No. Not in the way that you are talking about it.

25 Q. The defendants in this case have argued that they disclosed

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Ine - cross

1 that the opening balance was being calculated using a 9 percent
2 interest rate assumption and that employees would have
3 understood that using a 9 percent interest rate was a bad thing
4 and would have tipped them off that their accounts were worth a
5 lot less than the benefit that they had earned. Based on your
6 familiarity with what the average Foot Locker participant knew,
7 do you think they would have understood that the use of a 9
8 percent interest rate was a bad thing or a good thing?

9 MR. RUMELD: Objection.

10 THE COURT: Sustained.

11 You have to break that down into multiple pieces if
12 you are going to do it.

13 BY MR. GOTTESDIENER:

14 Q. Your understanding at the time, ma'am, was that the use of
15 the 9 percent was a good thing for participants, wasn't it?

16 A. I would say that I really didn't know, but --

17 MR. GOTTESDIENER: Can we play the clip 156, line 12
18 through line 18.

19 (The following was played:

20 "Q. And your understanding was the use of the 9 percent was a
21 good thing for participants?

22 "A. Yes.

23 "Q. And that's how you understood they understood it?

24 "A. Yes.

25 "Q. And that was how the Ducks explained it to people?

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1 "A. Yes.")

2 BY MR. GOTTESDIENER:

3 Q. The Ducks, just for clarity, those are the folks who worked
4 under you who had more direct contact on a daily basis with the
5 average participant?

6 A. Correct.

7 Q. You essentially took orders from the New York office, is
8 that fair?

9 A. Yes.

10 Q. They were in control of the way things got communicated to
11 participants, correct?

12 A. Yes.

13 Q. They told you how to tell people about the amended plan,
14 right?

15 A. Essentially, yes.

16 Q. And the administrator you understood to be the retirement
17 administrative committee --

18 A. Yes.

19 Q. -- right? Yes?

20 A. Yes.

21 Q. And your primary contact was Tom Kiley?

22 A. Correct.

23 Q. And he was the most knowledgeable about the ins and outs of
24 the pension, is that fair?

25 A. Correct.

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Ine - cross

1 Q. You also, though, had contact with Pat Peck --

2 A. Correct.

3 Q. -- about the amended plan, right?

4 A. Some, yes.

5 Q. As well as Carol Kanowicz?

6 A. Yes.

7 Q. And you knew and implemented the New York policy of telling
8 active employees who asked to know what they would get if they
9 were going to be paid just to give them the account balance?

10 A. If --

11 Q. Not if they actually requested a termination package, but
12 if they just called up and said what would I get paid, you
13 understood the policy that New York directed and you
14 implemented was tell them the account balance?

15 MR. RUMELD: Objection.

16 THE COURT: Hold on one second.

17 Why don't you restate, because you've got two
18 questions with a short 'if' at the beginning of an answer and
19 then you went back.

20 Go ahead and restate a question.

21 BY MR. GOTTESDIENER:

22 Q. The policy from New York was to tell participants the lump
23 sum they would receive if they requested to know that amount
24 was their account balance, correct?

25 A. I don't remember.

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Ine - cross

1 MR. GOTTESDIENER: Page 164, line 15:

2 "Q. And the instruction that New York gave you all was to, if
3 anybody was a current participant who asked what's the --
4 what's the amount I'd receive, you would tell them their
5 account balance?"

6 Your answer: "As a lump sum, correct."

7 BY MR. GOTTESDIENER:

8 Q. You gave that testimony, right?

9 A. Yes.

10 Q. New York did not tell you anything even remotely about the
11 benefit formula that we are using to convert is going to mean
12 that for basically everybody they are not going to earn any new
13 benefits for years, correct?

14 A. My understanding at the time was that it would take a few
15 years --

16 Q. I'm sorry. My question to you is New York did not tell you
17 that that was going to be the impact, they didn't say anything
18 like that even remotely to you that that was the impact of the
19 benefit formula --

20 MR. RUMELD: Objection, your Honor. She was
21 responding to a question.

22 Q. -- is that correct?

23 THE COURT: Hold on. Hold on.

24 Do you remember what you were going to say before?
25 You started to say, "My understanding at the time was that it

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Ine - cross

1 would take a few years --"

2 THE WITNESS: Yes. I was told by the people in the
3 executive office that it would take a few years for the
4 participant to actually get a lump sum based on the cash
5 balance account.

6 THE COURT: OK. Why don't you go ahead.

7 She's finished her answer. Go ahead and pose a new
8 question.

9 MR. GOTTESDIENER: Absolutely. Can I have the video,
10 please, page 205, line 2.

11 (The following was played:

12 "Q. And they didn't tell you anything at all even remotely
13 about the benefit formula that we're using to convert is going
14 to mean for basically everybody they're not going to earn
15 anything for years?

16 "MS. DePIETTO: Objection, form.

17 "A. No, that was not pointed out.")

18 BY MR. GOTTESDIENER:

19 Q. You gave that testimony didn't you?

20 A. Yes.

21 Q. Wasn't it true when you gave it?

22 A. I didn't remember at the time.

23 Q. Isn't that something pretty dramatic that you would have
24 remembered had this been pointed out to you?

25 A. I came in to the deposition not really understanding the

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1 types of questions I would be asked.

2 Q. You came into the deposition after four years of
3 preparation with your lawyers from Foot Locker, correct?

4 A. Yes.

5 THE COURT: Let me just ask. So your testimony today
6 is that you knew that there would be a period of time when
7 employees would not be earning or at least some employees would
8 not be earning additional retirement benefits?

9 THE WITNESS: Beyond 12/30/95, correct. But I thought
10 it was just a few years.

11 THE COURT: Who, if you can recall, provided you with
12 that information?

13 THE WITNESS: Tom Kiley.

14 THE COURT: Do you recall approximately when? Was it
15 shortly after the plan was announced or some later time or some
16 earlier time?

17 THE WITNESS: It was when we had a group meeting in
18 '95 to discuss the plan.

19 THE COURT: All right.

20 OK. You may proceed.

21 MR. GOTTESDIENER: I would like to play the clip at
22 203, starting at line 13:

23 (The following was played:

24 "Q. You seem like a very honest person. If you knew this was
25 going on, would you have disclosed it to people?

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1 "A. I certainly would have had a discussion with New York as
2 to why it was going on.

3 "Q. And New York did not tell you that this was going on, did
4 they?

5 "A. No, no.")

6 BY MR. GOTTESDIENER:

7 Q. Were you confused at that moment in the deposition?

8 A. Based on the questions being asked and my recollection at
9 that time I guess I was.

10 Q. You had 30 days to make changes to your deposition. You
11 didn't avail yourself of that opportunity, correct?

12 A. Correct.

13 MR. GOTTESDIENER: I would like to play 208, line 12.

14 THE COURT: You have to, before you play it --

15 MR. GOTTESDIENER: It's the same. She's saying that
16 she was --

17 THE COURT: I know. But I'm saying you have already
18 impeached her with one. Ask her another question and see
19 whether or not she is going to contradict the testimony before
20 you just play things.

21 MR. GOTTESDIENER: Sure.

22 BY MR. GOTTESDIENER:

23 Q. Because in fact you did not have any idea that people's
24 benefits were being frozen, you were not able to ask New York
25 pointed questions like, why didn't you just openly freeze the

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1 pension plan so people would know and perhaps start
2 contributing more to their 401(k) plans, correct?

3 MR. RUMELD: Objection.

4 THE COURT: Sustained. Don't answer it.

5 Q. If you knew --

6 THE COURT: Don't do the "if." Do it differently.
7 You know that.

8 MR. GOTTESDIENER: Actually, I don't, your Honor, so
9 my confusion is genuine.

10 THE COURT: I think that that question, if you're
11 reading a question, may have been objectionable in form at the
12 deposition, if that's what you are going back to.

13 MR. GOTTESDIENER: No.

14 THE COURT: Go ahead and just pose a question.

15 BY MR. GOTTESDIENER:

16 Q. What do you think people would have done if they found out
17 that what the company was doing --

18 THE COURT: You need to word it differently. You
19 can't word it in terms of this hypothetical.

20 Based upon your experience and knowledge as to
21 reactions that the participant would have to information that
22 you provided, do you think that the lack of additional growth
23 in their accrued balance was important to disclose?

24 THE WITNESS: Of the cash balance?

25 THE COURT: Of the accrued balance.

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Ine - cross

1 THE WITNESS: Well, they knew the 12/30/95 was a
2 frozen annuity as far as the cash balance. The basic thing the
3 employees knew, the participants knew was that they would get
4 the higher of the two, that they would not get less than what
5 they had under the old plan.

6 THE COURT: All right. You may proceed.

7 BY MR. GOTTESDIENER:

8 Q. You just told us earlier, though, that what participants
9 knew was, in terms of their lump sum, they were adding to their
10 lump sum as they continued to work after '96, right?

11 A. Correct.

12 Q. So are you saying that there was a difference you think in
13 your mind maybe that the annuity was frozen, but the lump sum
14 continued to grow?

15 A. The lump sum varied.

16 Q. In your mind?

17 A. From year to year.

18 Q. I'm sorry?

19 A. The lump sum would vary depending on the interest rates.

20 Q. But in terms of getting value, added value in exchange for
21 service to the company, you thought that it was growing,
22 correct?

23 A. The account balance was growing.

24 Q. I'm sorry. Not the account balance, the lump sum that
25 somebody would get, the lump sum form of payment was growing in

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1 exchange for work for the company?

2 A. I could see where a participant would think that.

3 Q. And you were one of the participants who did think that,
4 correct?

5 A. I may have said that in the deposition, but I knew that it
6 wasn't growing.

7 Q. But you thought your own lump sum was growing for three
8 years, didn't you, ma'am?

9 MR. RUMELD: Objection, your Honor.

10 THE COURT: Overruled.

11 A. I didn't really -- I didn't think that. I knew that in the
12 long run because I was leaving so early in the plan that I
13 would get a lump sum based on '95.

14 Q. I'm sorry. You are there --

15 THE COURT: Hold on. I really am going to ask you not
16 to do the facial expressions and the --

17 MR. GOTTESDIENER: Your Honor, this is
18 cross-examination, and I'm genuinely confused.

19 THE COURT: Hold on.

20 You have my instruction.

21 MR. GOTTESDIENER: I am trying --

22 THE COURT: I know. But I am going to say it's
23 really --

24 MR. GOTTESDIENER: I really am trying to follow them.

25 THE COURT: I understand.

F7lnosb1

Ine - cross

1 MR. GOTTESDIENER: I promise you.

2 THE COURT: I understand. So we will just proceed
3 from here.

4 MR. GOTTESDIENER: OK.

5 THE COURT: OK.

6 BY MR. GOTTESDIENER:

7 Q. So you are working -- you don't know in '96 that you are
8 going to leave in '99, right?

9 A. That's true.

10 Q. So your last answer was about knowledge that you had in
11 '99, correct?

12 A. That's true.

13 Q. I'm asking you, in '96, and '97 and '98, you did not
14 know -- you saw the clip, you did not know that you were a
15 victim of this freeze. You thought your benefit was growing
16 during that time, didn't you?

17 MR. RUMELD: Objection.

18 THE COURT: Overruled.

19 A. I guess I didn't think of it as a freeze.

20 Q. You thought --

21 A. But you're correct. I did not earn anything for the years.

22 Q. I'm sorry. I am not right now asking you about that fact.
23 That is not a disputed fact. I'm asking, in your mind, you
24 thought you were getting new lump sum benefit growth in
25 exchange for continued service for the company in '96 and '97.

F7lnosbl

Ine - cross

1 That's how you were thinking, right?

2 MR. RUMELD: Objection.

3 THE COURT: Overruled.

4 A. I think -- I didn't think of it that way, as the minimum
5 lump sum. I only thought of things in terms of an annuity or a
6 cash balance account.

7 Q. You thought the 9 percent was a good thing for you and
8 others, didn't you?

9 A. Without any other information available at that time, I
10 did.

11 Q. Outside of the New York office, you probably had more
12 information available to you than any participant in the
13 country, correct?

14 A. Probably.

15 Q. Not only was it your understanding that the use of 9
16 percent was a good thing for you, you made sure that the
17 employees under you explained the 9 percent to people as a good
18 thing for them, correct?

19 A. I don't know if they said it was a good thing, but I do
20 know they explained the 9 percent.

21 Q. As a good thing?

22 A. I don't remember.

23 MR. GOTTESDIENER: Transcript page 156, line 12:

24 "Q. And your understanding was the use of the 9 percent was a
25 good thing for participants?

F7lnosb1

Ine - cross

1 "A. Yes.

2 "Q. And that's how you understood they -- meaning the
3 participants -- understood it?

4 "A. Yes.

5 "Q. And that's how the Ducks explained it to people?

6 "A. Yes."

7 A. That's what I said.

8 Q. And that's true?

9 A. That's what I thought at the time, yes.

10 Q. And you were responsible for what the Ducks said to people,
11 correct?

12 A. Correct.

13 THE COURT: What did you think the 9 percent referred
14 to in connection with the retirement benefit participants would
15 be eligible for?

16 THE WITNESS: I understood the 9 percent was a
17 conversion of the annuity to a present value based on what was
18 needed for people, to earn a rate of 9 percent on that account
19 until age 65 to get what they would have gotten as an annuity
20 from 12/30/95. So it was just a conversion of one thing in the
21 future --

22 THE COURT: Why did you think 9 percent would have
23 been a good thing versus a lower discount rate?

24 THE WITNESS: At that time, I didn't understand that a
25 lower discount rate would be better.

F7lnosb1

Ine - cross

1 THE COURT: All right. You may proceed.

2 Q. You didn't even understand it was a discount rate, the 9
3 percent, right?

4 THE COURT: At the time?

5 MR. GOTTESDIENER: Yes.

6 BY MR. GOTTESDIENER:

7 Q. At the time you thought it of as a factor?

8 A. I didn't think of it as that, no. It was always just a
9 present value.

10 Q. And it was a factor?

11 A. Correct.

12 Q. What you thought was, well, they had a 9 percent factor and
13 it used mortality tables, so it really took a look at your age
14 and it projected out what your expected accrued benefit would
15 be at your normal retirement date and then it brought it back
16 in a present value using one of the mortality tables to say
17 this is the amount of money that you would get to receive, what
18 we project at the 9 percent, correct?

19 A. Correct.

20 Q. You further understood that amount of money was if you
21 invested, we assume the company assumes that you would get the
22 same amount of money on your own using that lump sum value?

23 A. Correct.

24 Q. If you actually knew at the time that the effect of this
25 was very different and it had an impact of freezing benefits

F7lnosb1

Ine - cross

1 for a time, you would have asked New York, why didn't you just
2 freeze the plan openly, stop it like many companies did and
3 tell people you're frozen, you can cash out or leave it until
4 your retirement age and then just do the 401(k), why do
5 anything else?

6 MR. RUMELD: Objection.

7 Q. That is what you would have said or asked to New York had
8 you known at the time the true impact of a conversion, correct?

9 MR. RUMELD: Objection.

10 THE COURT: Sustained.

11 You've got too many pieces embedded in that question.

12 MR. GOTTESDIENER: What I'm trying to do, I'm sorry,
13 is track an answer that she gave.

14 THE COURT: I understand. But if your question at the
15 deposition was ill formed, I can't fix it now for you. If you
16 can, break it down and then combine it.

17 BY MR. GOTTESDIENER:

18 Q. You would have questioned New York had you known the true
19 impact of the conversion, correct?

20 MR. RUMELD: Objection.

21 THE COURT: Overruled.

22 A. Yes. I would have called and asked.

23 Q. And --

24 THE COURT: Hold on one second. Let me just say that
25 there's case law on if questions with witnesses who have

F7lnosb1

Ine - cross

1 extensive experience in factual areas and I looked at that
2 recently. So that is the basis for my ruling, which may come
3 up again with this particular witness.

4 You may proceed.

5 BY MR. GOTTESDIENER:

6 Q. You would have asked them why not just openly tell people
7 the pension is frozen and for your retirement you need to use
8 the 401(k)?

9 A. I don't know if I would have asked that particular
10 question. I would have basically asked why didn't they use a
11 lower interest rate.

12 Q. Based on your frequent interactions with New York at the
13 time -- withdrawn. You did have frequent interactions with the
14 folks in the New York office?

15 A. Correct.

16 Q. In particular, Mr. Kiley and Ms. Kanowicz?

17 A. Correct. And Marion Derham more than Carol Kanowicz.

18 Q. But Kiley more than Marion Derham?

19 A. Correct.

20 Q. Based on your interactions with them, don't you conclude
21 that they intentionally failed to inform you that the whole
22 population was going to have their benefits frozen effectively
23 for several years?

24 MR. RUMELD: Objection.

25 THE COURT: Hold on one second.

F7lnosb1

Ine - cross

1 Let me just read this. If you are asking about what
2 she's concluding today, then I sustain the objection.

3 If you are asking something else, then you can
4 rephrase.

5 BY MR. GOTTESDIENER:

6 Q. When I informed you of this in 2012, you concluded that
7 they intentionally failed to inform you of this, correct?

8 A. I said that in the deposition?

9 Q. That's my question to you.

10 A. I don't believe they did things intentionally. I mean,
11 they told me what they could based on the questions I asked.
12 They never withheld information to my knowledge.

13 Q. They certainly didn't tell you that there was essentially a
14 companywide benefit freeze for a period of years, right?

15 MR. RUMELD: Objection.

16 THE COURT: I think we have been over this.

17 MR. GOTTESDIENER: I agree, your Honor.

18 THE COURT: Do you want to ask the question, or are
19 you going to ask a different question?

20 Let me sustain the objection. You can go on.

21 BY MR. GOTTESDIENER:

22 Q. You yourself equated account growth with lump sum growth,
23 correct?

24 A. At the time.

25 Q. At the time.

F7lnosb1

Ine - redirect

1 A. At the time I probably would have.

2 MR. GOTTESDIENER: No further questions.

3 THE COURT: All right. Thank you. Mr. Rumeld.

4 MR. RUMELD: Is it all right if I just move this back
5 so I am a little closer to Mr. Clark?

6 THE COURT: Yes.

7 MR. RUMELD: Thank you, your Honor.

8 REDIRECT EXAMINATION

9 BY MR. RUMELD:

10 Q. Ms. Ine, you left Foot Locker or Woolworth in 1999?

11 A. Correct.

12 Q. Since then, what have you been doing?

13 A. After that I went to a new employer and retired from them
14 in 2009.

15 Q. What did you do for that new employer?

16 A. I was their benefits manager.

17 Q. And what specifically did you do as a benefits manager?

18 THE COURT: For the new employer?

19 MR. RUMELD: Yes.

20 A. I'm sorry. What was the --

21 Q. As a benefits manager, what were your responsibilities?

22 A. I had similar functions as I did when I was with Woolworth,
23 except that I didn't have to deal with stock purchase. I
24 didn't have a pension plan. We only had a 401(k) plan.

25 Q. Since leaving Foot Locker, have you had any

F7lnosb1

Ine - redirect

1 responsibilities in connection with cash balance plans?

2 A. No.

3 Q. In any context?

4 A. No.

5 Q. Now, when you left Foot Locker, you elected the lump sum
6 option, is that right?

7 A. Correct.

8 Q. How did you feel about your pension benefits at the time?

9 A. At the time, I was happy to get what I did in a lump sum
10 since it's something that I wouldn't have had available to me,
11 as I wasn't of retirement age at the time I left.

12 Q. Were you aware at the time you took these benefits that you
13 had not accrued any new benefits since the end of 1995?

14 A. Yes.

15 Q. Did that come as a surprise to you when you left?

16 A. No.

17 Q. Why is that?

18 A. Because I did see what was -- I was able to determine my
19 lump sum value before I left, so I knew that I hadn't accrued
20 enough under the cash balance to match what I would have gotten
21 under the 12/30/95 frozen accrued benefit.

22 Q. At the time you were being deposed by Mr. Gottesdiener a
23 couple of years ago, did you understand that then as well?

24 A. Yes.

25 Q. In fact, you also testified in between the questions that

F7lnosb1

Ine - redirect

1 Mr. Gottesdiener showed you before, "I saw what was happening
2 in my particular case. I could see that I was going to get
3 what I had in the accrued benefit at the point that I made the
4 decision I was going to leave.

5 Do you remember giving that testimony?

6 A. Yes.

7 Q. What did you mean by that?

8 A. I mean that I calculated it myself to determine what
9 benefit would be available.

10 Q. Right. When you said that I was going to get what I had in
11 the accrued benefit, what did you mean by that?

12 A. The 12/30/95 frozen benefit.

13 Q. Right. So in your mind accrued benefit meant the benefit
14 accrued under the prior plan?

15 MR. GOTTESDIENER: Objection.

16 THE COURT: Overruled.

17 A. Can you restate that?

18 Q. When you referred to the accrued benefit, what were you
19 referring to?

20 A. 12/30/95.

21 Q. OK. Thank you.

22 THE COURT: Let me ask. You referred in a couple of
23 answers to when you calculated your benefit you understood.

24 THE WITNESS: Yes.

25 THE COURT: Prior to the time that you calculated your

F7lnosb1

Ine - redirect

1 benefit, did you understand that your accrued benefit under the
2 old plan would not be increasing with time?

3 THE WITNESS: Well, the 12/30/95 was a frozen benefit.
4 In order to come up with an amount of an annuity in the new
5 plan, at the time that you were going to get a benefit, they
6 would take the cash balance and apply factors to turn it into
7 an accrual, and the higher of the two accruals between the cash
8 balance and the frozen amount for 12/30/95, the higher one was
9 selected for calculating the minimum lump sum.

10 THE COURT: I understand that point. I just want to
11 see whether or not you meant anything in particular when you
12 tied your prior testimony to the statement "when I calculated."

13 So I'm trying to figure out, is there a distinction in
14 your mind between what you understood at the time you
15 calculated your own benefit, or did you have that same
16 understanding prior to any calculations you may have performed
17 for yourself?

18 THE WITNESS: I expected, based on the comment from
19 Tom Kiley, that it would take a few years, that my short time
20 in the cash balance plan would not result in a minimum lump sum
21 from the cash balance account.

22 THE COURT: All right. You may proceed.

23 (Continued on next page)
24
25

F7LJOSB2

Ine - redirect

1 Q. Ms. Ine, back in 1999, did you feel there was anything
2 unique about your experience relative to the other
3 participants?

4 A. No.

5 Q. So back in '99, was it your understanding that there may
6 have been other participants who would get a benefit based on
7 the pre-'96 accrual?

8 A. Yes.

9 Q. What about before 1999, was it your expectation before '99
10 as well that that would be the case?

11 A. Yes.

12 Q. I want to show you what has not been previously identified
13 as Defendant's Exhibit 149.

14 MR. RUMELD: May I approach, your Honor?

15 THE COURT: You may.

16 (Pause)

17 BY MR. RUMELD:

18 Q. Now, you testified a little earlier about attending a
19 meeting with Mr. Grefig where you received an explanation of
20 how the cash balance plan worked?

21 A. Yes, yes.

22 Q. From reviewing these notes, are you able to tell whether
23 these are notes of that meeting?

24 A. Yes, they are familiar to me.

25 Q. In what way are they familiar?

F7LJOSB2

Ine - redirect

1 A. I remember these handwritten notes. They were provided at
2 the meeting -- right after the meeting, I should say.

3 Q. Were these notes actually given to you?

4 A. Yes.

5 Q. You see the people referred to at the top there?

6 A. Yes.

7 Q. Do you remember attending a meeting with those folks?

8 A. Yes.

9 THE COURT: Is this also a PX that we have used
10 before?

11 MR. GOTTESDIENER: Yes, your Honor, it is. It is 126.

12 THE COURT: Thank you. All right.

13 BY MR. RUMELD:

14 Q. Do you remember, for example, looking at the bottom
15 bulleted point on the first point, being told beginning 1-1-96
16 we will use the GATT interest rate for 30-year Treasury bills
17 in effect on 12-31 or for each year for determining the minimum
18 lump sum for the subsequent year?

19 A. Yes.

20 Q. That is what was told you back at the time?

21 A. Yes.

22 Q. If you look at the next page, there is a reference to
23 calculation of minimum lump sum. Do you see that?

24 A. Yes.

25 Q. And then in Item 2, it specifically refers to the 12-31-95

F7LJOSB2

Ine - redirect

1 accrued benefit. Do you see that?

2 A. Yes.

3 Q. And then there is kind of a formula for how to go about
4 doing that, right?

5 A. Correct.

6 Q. So is it your recollection, then, that at this meeting, at
7 this first meeting that you attended, you received an
8 explanation about the need to compare the account balance to a
9 minimum lump sum that was calculated based on the pre-'96
10 accrued benefit?

11 A. Yes.

12 Q. Now, you had a team of people that you worked with --

13 A. Yes.

14 Q. -- in Wisconsin. What were their responsibilities?

15 A. There were two teams involved. One of the teams was
16 responsible for taking all the incoming phone calls and they
17 would answer questions that were more general. Anything that
18 was beyond generalities, they would pass to the second team
19 that was exclusively responsible for calculating pension
20 benefits.

21 Q. So the second team that was responsible for calculating
22 pension benefits, how did they know how to do that?

23 A. They received instructions from New York, prepared
24 instructions on calculations. We had information in the
25 beginning and then as questions arose, we would have to go back

F7LJOSB2

Ine - redirect

1 to New York to ask for further explanations on how to perform
2 calculations based on a question we received from a
3 participant.

4 Q. Was it your understanding that the people responsible for
5 doing these calculations understood how you use the greater or
6 both analysis?

7 A. Yes.

8 Q. There was no way you could get to somebody's benefits if
9 they performed that calculation?

10 MR. GOTTESDIENER: Objection.

11 A. Correct.

12 THE COURT: Let me ask, because I want to see whether
13 there is a distinction between participants who may have asked
14 generally without giving a termination date, or indicating any
15 plans to terminate, that they wanted to understand what their
16 retirement benefit was worth and whether or not the efforts
17 undertaken with respect to that group was different from those
18 individuals who indicated an actual plan to terminate and
19 perhaps even give a date. That is sort of the point of my
20 question.

21 Let me ask a discrete couple of questions to try to
22 get at that point, which is do you know whether there was a
23 practice for the individuals who worked for you to give both
24 the calculation for a participant relating to their cash
25 account balance as well as a calculation related to their

F7LJOSB2

Ine - redirect

1 accrued minimum lump sum as of 12-31-95 when any participant
2 asked for the value of their retirement benefit? Do you
3 understand the question?

4 THE WITNESS: Yes, I do. In the beginning we limited,
5 because we did not have automation, we limited the questions to
6 only people who were of retirement age.

7 As the system went into production, then we could
8 handle questions when these persons were going to retire or
9 terminate or for whatever reasons wanted to have an estimate.

10 THE COURT: Let's just take the people who just for
11 whatever reason wanted to have an estimate and they're not
12 retiring or is indicating they're retiring and not indicating
13 they're terminating. That is the group, all right?

14 THE WITNESS: All right.

15 THE COURT: Do you know whether or not the individuals
16 who were working for you would calculate both the accrued lump
17 sum and the cash account balance and give the participants
18 both? Do you know whether or not they did that?

19 THE WITNESS: They would calculate both, but they
20 didn't necessarily give the fact that they determined two
21 different annuities to come up with what the minimum lump sum
22 would be. The estimate would go out and they would say the
23 accrued benefit amount and what the minimum lump sum was.

24 If somebody came back and said they wanted to know
25 exactly how this was done, then we would do a correspondence

F7LJOSB2

Ine - redirect

1 with them that showed specifically how all these calculations
2 took place, and that the higher of the two accruals was used to
3 calculate the minimum lump sum.

4 THE COURT: All right. Thank you.

5 BY MR. RUMELD:

6 Q. Let me just follow up on this in a couple of ways.

7 There were a lot of calls that came into Wisconsin, is
8 that right? You talked about that?

9 A. Yes, in the beginning, yes.

10 Q. In your experience, were the majority of people who called
11 or asked questions in any form, in your experience, were they
12 people who were nearing their termination date or just people
13 who were working?

14 A. I think that there were more people in general. They
15 weren't going to necessarily retire. They just had questions
16 about the numbers that -- well, I shouldn't say that because
17 they got a pension statement. In the beginning the calls were
18 just related to understanding of the plan.

19 Later when statements went out, we got more specific
20 questions from people as to how the numbers were calculated,
21 and they were compared with other employees and would get
22 questions arising from those comparisons.

23 Q. If I put aside the few weeks after the cash balance plan
24 went into effect, in your experience, did participants pay much
25 attention to their benefits before they were leaving?

F7LJOSB2

Ine - redirect

1 A. In the old plan, they really, they capped statements, but
2 they really didn't pay attention. They received a number of
3 what the accrued benefit was, but they didn't really ask
4 questions until they actually terminated.

5 In the cash balance account, it was I think people
6 were -- because they obtained money immediately, they would ask
7 more questions immediately as they saw numbers come through on
8 estimates.

9 Q. If they could take money immediately if they were leaving?

10 A. Yes, or retiring, yes.

11 Q. Is that when they would ask the questions, if they were
12 thinking about leaving or retiring?

13 A. In the cash balance account, they might have asked -- they
14 would have probably asked more questions when they -- they did
15 ask more questions when they saw a pension statement,
16 especially because they would see it then, so they could see
17 the prior year's pension statement and compare it with the
18 current year.

19 MR. RUMELD: I want to show you Defendant's Exhibit
20 108. May I approach?

21 THE COURT: Yes.

22 MR. HUANG: PX 163.

23 THE COURT: All right.

24 BY MR. RUMELD:

25 Q. I think for the purposes of my questions, you only need to

F7LJOSB2

Ine - redirect

1 look at the first half of that first page.

2 A. (Pause)

3 Q. Okay?

4 A. Yes.

5 Q. Does this e-mail look familiar to you?

6 A. I don't remember it.

7 Q. Is there any reason to think that you didn't send this note
8 out in April of 1996?

9 A. No.

10 Q. Who were the people to whom the e-mail was addressed?

11 A. It's all of the people in the team that calculates pension
12 benefits and the manager and supervisor of the department.

13 Q. Who would that be?

14 A. Ann Wade and Jen Valenti. Ann was the manager, Ann Wade
15 was the supervisor, and Sue Willis was the manager of health
16 and welfare benefits, but she did some assisting with pension
17 when we were -- at this point we were backed up because we
18 didn't have a system.

19 Q. If you will read with me, do you see the paragraph that
20 begins you will need to complete the lump sum worksheet?

21 A. Yes.

22 Q. What was the lump sum worksheet?

23 A. It was a form that had been created that would help the
24 staff who actually did the calculations go through the various
25 steps that they needed to take in order to come up with the

F7LJOSB2

Ine - redirect

1 accrued benefit to use when calculating the lump sum amount.

2 Q. If you look a couple of sentences later, it says the figure
3 on the Mercer report for the minimum lump sum is as of 1-1-96.

4 Do you see that?

5 A. Yes.

6 Q. Why is that the case?

7 A. In the beginning, Mercer gave us a report of all of the
8 cash balance calculations, so we would have to go to the Mercer
9 books to find the 1-96 for the individual.

10 Q. And, generally speaking, how did the 1-1-96 minimum lump
11 sum compare to the amount of the cash balance account at that
12 time?

13 A. At this time they were paying based on the old plan.

14 Q. Why was that the case?

15 A. Because the minimum -- the annuity of the old plan was
16 higher than the annuity that was calculated for the cash
17 balance account.

18 Q. If the annuity is higher under the old plan, what does that
19 mean for the minimum lump sum?

20 A. It means that the minimum lump sum would be calculated on
21 the higher of the two because the old plan would be calculated
22 on the old plan accrual.

23 Q. Do you have any reason to believe that the people you were
24 communicating with here did not understand that?

25 A. No.

F7LJOSB2

Ine - redirect

1 Q. Do you have any reason to believe that if participants
2 asked about how their benefits were being calculated, this
3 wouldn't have been explained to them?

4 A. No.

5 Q. If you look a little further, it says in the second
6 paragraph, if you find that the cash balance is greater than
7 the MLS, or minimum lump sum, you will have to let me know. We
8 will need to do something different and NYO -- I take it that
9 is the New York office -- has not prepared a worksheet yet for
10 that scenario.

11 Do you see that?

12 A. Yes.

13 Q. How was it that there wasn't a worksheet available at this
14 time for the purposes of calculating if the benefit of the cash
15 balance account was bigger than the minimum lump sum?

16 A. I think since this is April of '96, most of the
17 calculations would be made from the old accrual since it was
18 higher than the cash balance accrual.

19 Q. Everyone in your group understood at this time that by
20 virtue of the way the calculations worked, a participant was
21 going to get a benefit based on the pre-'96 benefit rather than
22 the amount of the cash balance account?

23 MR. GOTTESDIENER: Objection.

24 A. Correct.

25 THE COURT: Sustained. The answer is struck. Why

F7LJOSB2

Ine - redirect

1 don't you go, if you want to -- you shouldn't probably lead as
2 much.

3 MR. RUMELD: I'll work on it.

4 THE COURT: All right.

5 BY MR. RUMELD:

6 Q. What was your understanding at this time as to the
7 likelihood that a participant leaving in the first few months
8 of '96 would receive a benefit based on the pre-'96 accrual?

9 A. My understanding was that most people probably would get
10 the minimum lump sum based on the old plan accrued.

11 Q. What was your understanding as to what your staff
12 understood?

13 A. They understood the same thing.

14 Q. What was your understanding at the time about how long that
15 would continue that participants would more likely receive a
16 benefit based on the minimum lump sum?

17 A. Based on the conversation that I had with Tom Kiley, with
18 it being a few years, and I thought perhaps three years.

19 Q. Perhaps three years?

20 And what about your staff, do you think they
21 understood that as well?

22 A. I don't think I ever told them how long it might last.

23 Q. So they just knew how to do the calculation?

24 A. Right.

25 Q. Now, did you understand at the time the relationship

F7LJOSB2

Ine - redirect

1 between getting paid the minimum lump sum benefit based on the
2 prior accrual and whether accrued benefits were being earned
3 under the new plan?

4 MR. GOTTESDIENER: Objection.

5 A. Can you say that in a different way.

6 BY MR. RUMELD:

7 Q. Did you have an understanding as to whether a participant
8 who received a benefit based on the pre-'96 accruals had
9 accrued any new benefits under the new plan?

10 A. I am sorry. Did the team?

11 Q. I am asking what you understood.

12 A. Oh, I would have expected that the majority would have gone
13 with the old plan accrual.

14 Q. My question is, what does that mean in terms of whether a
15 participant accrues any new benefits under the new plan?

16 A. It means that the amount of the cash balance, when it
17 converted to an annuity, was less than the old plan.

18 Q. Okay. At the time did you think of this as a frozen
19 benefit?

20 A. The only frozen benefit that I ever thought of was the
21 12-30-95 frozen benefit.

22 Q. Is the answer to my question no, that the fact that a
23 participant was receiving a minimum lump sum based on the prior
24 benefit did not translate into your mind as a plan freeze?

25 A. Not, not at that point, no.

F7LJOSB2

Ine - redirect

1 Q. It was only when you were being deposed, that was the first
2 time you started to think about it that way?

3 MR. GOTTESDIENER: Objection.

4 THE COURT: Overruled.

5 BY MR. RUMELD:

6 Q. Before your deposition, had you ever thought about this
7 greater of both calculations as being synonymous with a plan
8 freeze?

9 A. I never thought that.

10 Q. Before your deposition, did you ever think about the
11 greater of both calculations being synonymous with a
12 participant accumulating credits that didn't count?

13 A. At the time I didn't think that.

14 Q. At any time before your deposition?

15 A. I know what I said during the deposition, but as I
16 indicated, I really didn't think that.

17 MR. RUMELD: Let's look at exhibit, Defendant's
18 Exhibit 95. May I approach?

19 THE COURT: Yes.

20 BY MR. RUMELD:

21 Q. Do you recognize this type of document?

22 A. Yes, I do.

23 Q. Would you tell the court what it is.

24 A. This is what a participant would receive when they asked
25 for an estimated, an estimate of their benefits.

F7LJOSB2

Ine - redirect

1 Q. What about a participant who was planning to leave
2 employment?

3 A. The same.

4 Q. He or she would also receive a form like this?

5 A. Yes, yes.

6 Q. This particular form says it was prepared by Marion Derham.
7 Do you see that?

8 A. Yes.

9 Q. Do you know whether estimates like these were prepared by
10 people in your group in Wisconsin?

11 A. Wisconsin did them, too.

12 Q. Would you say there were a lot of these prepared?

13 A. Yes.

14 Q. Because, in fact, a lot of participants were leaving
15 between 1996 and 1999?

16 A. Correct, correct.

17 Q. Now, you see that towards the top there is a benefit
18 payment date, January 1st, 2000?

19 A. Yes.

20 Q. What does that date correspond to?

21 A. That is the date that the benefit will go into effect. So
22 all of the calculations, looking at years and person's age, et
23 cetera, are based off of January 1, 2000.

24 Q. And the next line, the estimated annual accrued benefit as
25 of benefit payment date, what is that?

F7LJOSB2

Ine - redirect

1 A. That is the higher of the calculation of the cash balance
2 annuity versus the old plan annuity.

3 Q. By the "cash balance annuity," what do you mean by that?

4 A. It would take the cash balance which was a present value
5 and apply factors to turn it into an accrual, and it would come
6 back with an accrual number that was calculated based on the
7 cash balance at the time.

8 Q. So this figure here would be whichever of those two
9 annuities was greater?

10 A. Yes.

11 Q. If the greater annuity was the pre-'96 annuity, how would
12 it compare to the 12-31-95 annuity reflected on the statement a
13 participant received in 1996?

14 A. I am sorry. Prepared when?

15 Q. Do you remember in 1996 there were benefit statements that
16 went out to all the participants?

17 A. Yes.

18 Q. Did those statements include the accrued benefit through
19 the end of 1995?

20 A. Yes.

21 Q. So how would that figure for the accrued benefit through
22 the end of '95 compare to this figure if the 1995 accrued
23 benefit was greater than the cash balance accrued benefit?

24 A. It was greater, it would show the 12-30-95 value.

25 Q. So it would be the same amount as in the prior statement?

F7LJOSB2

Ine - redirect

1 A. Correct.

2 Q. Now, if you look in the middle of the page there is a
3 paragraph that begins the lump-sum payment, do you see that?

4 A. Yes.

5 Q. I'll just read that and then ask you for your understanding
6 of that.

7 "The lump-sum payment indicated above represents the
8 greater of your account balance or a minimum lump sum. The
9 minimum lump sum is determined by multiplying your annual
10 accrued benefit by a factor that is based on the mortality
11 table and interest rate in effect on your benefit payment
12 date."

13 Do you see that?

14 A. Yes.

15 Q. Could you explain to me the second sentence? How is that
16 calculation performed?

17 A. Well, first of all, what it is talking about here is the
18 annual accrued benefit. It doesn't indicate whether it is
19 talking about -- that there are two.

20 What this is saying, what is really happening is we're
21 calculating the cash balance accrual by using factors to bring
22 it to the value, equal -- not equal in value, but apples and
23 apples, both looking at annuities which is then whichever is
24 higher is the one that will be used to calculate the minimum
25 lump sum.

F7LJOSB2

Ine - redirect

1 Q. The annual accrued benefit referred to in this sentence,
2 how does it compare to the estimated annual accrued benefit on
3 the top of the page?

4 A. Well, it is basically the same thing as what is on the top
5 of the page. It is only talking about that particular accrued
6 benefit.

7 Q. So the minimum lump sum is calculated off of that figure at
8 the top of the page?

9 A. Yes.

10 Q. The figure at the top of the page is the greater of the two
11 accrued benefits?

12 A. Yes.

13 THE COURT: And the factor based on the mortality
14 table and interest rate, where is that on this page?

15 Is that the GATT factor or is that something else that
16 is not reflected here?

17 THE WITNESS: It is the factor that we need to use
18 based on the T-Bills, but I don't believe it is on this
19 worksheet.

20 THE COURT: So the minimum lump sum interest rate,
21 that is 5.06 reflected there?

22 THE WITNESS: I don't see it, no.

23 THE COURT: It is actually underneath the -- if you
24 follow down at the top of the page it has benefit payment date
25 and the fourth line down --

F7LJOSB2

Ine - redirect

1 THE WITNESS: You're right, yes, that would have been
2 the rate that was used to come up with with the minimum lump
3 sum value.

4 THE COURT: You may proceed.

5 MR. RUMELD: Thank your Honor.

6 BY MR. RUMELD:

7 Q. Could you look at Defendant's Exhibit 122 which is attached
8 to your declaration.

9 MR. RUMELD: I believe it is also Plaintiff's Exhibit
10 930 and 931.

11 THE COURT: Let me see if it is in here. If it is in
12 here, then I will use this one. It is not, so I'll take it
13 from you.

14 (Pause)

15 THE COURT: DX-122 is PX-930?

16 MR. RUMELD: I think it is a combination of 930 and
17 931.

18 THE COURT: All right. Thank you.

19 BY MR. RUMELD:

20 Q. Now, there are several e-mails here, Ms. Ine, and I
21 apologize for the copy, but that is the best we can do.

22 You appear to be copied on several of these e-mails.
23 Could you look at the one all the way at the bottom which is
24 from Marion Derham. It says during a conference call Carol and
25 I had with Don on May 2, 1997. Who was Don?

F7LJOSB2

Ine - redirect

1 A. Don was the benefits manager at that time.

2 Q. At that time? He came in a little later?

3 A. Yes.

4 Q. And he was in your group?

5 A. He was in the Milwaukee office.

6 Q. What was his last name?

7 A. Kappel.

8 Q. "During the conference call, Carol and I had with Don on
9 May 2, 1997, Don indicated that HROC was getting inquiries from
10 participants requesting an explanation as to how their benefit
11 was calculated. If I remember correctly, Don mentioned two
12 specific types of questions. Why is my accrued benefit the
13 same as it was on my last estimate statement? Why is the lump
14 sum on the current estimate lower than the lump sum on my
15 estimate I received last year?"

16 Do you see that?

17 A. Yes.

18 Q. Are you able to answer those two questions?

19 A. Yes.

20 Q. So go ahead, one at a time.

21 A. Why is my accrued benefit the same as it was on the last
22 statement?

23 That is saying it is using the 12-30-95 accrued
24 benefit in the calculation instead of the cash balance accrued
25 benefit.

F7LJOSB2

Ine - redirect

1 Why is the lump sum lower than the lump sum on the
2 estimate that they got last year?

3 And that is because the interest rate went up on the
4 30-year T-Bill, and so as a result, the interest goes up, the
5 minimum lump sum goes down.

6 Q. Now, what you just said about the interest rate, is that
7 something you understood back in 1996, 1997, 1998?

8 A. I knew the interest rate would be based on the annual
9 figure. I had no idea what the figures would be.

10 Q. Right, but the concept of the minimum lump sum going down
11 if the interest rate being higher, is that something you
12 understood then?

13 A. Not at that time, but as we went along, and this is 1997,
14 so at the time of Don's note, I knew.

15 Q. What was the purpose of Don communicating this to the folks
16 in New York?

17 A. Any pension calculation even before the cash balance
18 account, all communication was prepared by New York, or if we
19 prepared it, it would have to be sent to them and approved
20 before we could issue it.

21 Q. So this is an effort on his part to learn how to respond to
22 these questions?

23 A. Yes.

24 Q. Do you have any reason to think that the New York office
25 didn't cooperate in providing the response?

F7LJOSB2

Ine - redirect

1 A. I have no reason to think that.

2 Q. In fact, would you look at Exhibit 79 to your declaration.

3 A. Yes, yes.

4 MR. RUMELD: Your Honor, would you like a copy?

5 THE COURT: Have we used this before?

6 MR. RUMELD: I don't think so.

7 THE COURT: All right. Then your loose copies are
8 easier than your --

9 MR. RUMELD: Right. I get it and I apologize.

10 THE COURT: That is fine.

11 BY MR. RUMELD:

12 Q. Could you tell me, Ms. Ine, what this document is.

13 A. This is an example of when we get an approved text from New
14 York, we would create model letters that were used to respond
15 to participants. So this is a letter that was sent to someone
16 with questions and was given the information that they're
17 asking for.

18 Q. So is this a form letter?

19 A. Yes.

20 Q. So, in other words, this was provided by New York to
21 Wisconsin?

22 A. Yes.

23 Q. And then Wisconsin is expected to make use of this form?

24 A. Yes.

25 Q. Can you tell whether this letter is responsive to one or

F7LJOSB2

Ine - redirect

1 both of the questions we just looked at?

2 A. Yes, it does answer both questions.

3 Q. So, for example, it says towards the bottom of that first
4 page, "Although your accrued benefit will not change, the
5 interest rate as explained previously does change. Since the
6 interest rate in 1997 is higher than the interest rate in 1996,
7 the amount your money can earn is greater. Therefore, the
8 factors decrease as the interest rate increases to achieve the
9 same accrued benefit at normal retirement date. This results
10 in lower lump sums when interest rates increase."

11 A. Yes.

12 Q. Did you understand this was an explanation provided at the
13 time to participants who were come make about their --

14 A. Yes.

15 Q. Let me finish the question. Who were complaining about
16 their benefits going down, so to speak?

17 A. Yes.

18 MR. RUMELD: Now, if you could take a look at
19 Defendant's Exhibit 49, which is attached to your declaration
20 as well,? Your Honor, I can hand this one up as well.

21 THE COURT: All right.

22 BY MR. RUMELD:

23 Q. Now, the redacted box at the time and the reference to the
24 number underneath, that is just our effort to redact personal
25 information about a particular participant. Do you see that?

F7LJOSB2

Ine - redirect

1 A. Yes.

2 Q. Would you agree with me that this letter is based on the
3 form letter we just looked at before?

4 A. Yes.

5 Q. The person signing the letter is whom?

6 A. Don Kappel.

7 Q. Is there any reason not to believe that Mr. Kappel used
8 that form letter to respond to the participants you said made
9 these inquiries?

10 A. There is no reason to believe we would not use this.

11 Q. Now, earlier you testified about your concern that some of
12 the company-wide communications used legalese. Do you remember
13 that testimony?

14 A. Yes.

15 Q. Would the word "participant," viewed by you, be legalese?

16 A. Yes.

17 Q. And why is that?

18 A. Employees that worked at the store didn't, if it had said
19 employees which they would understand. A participant means
20 somebody who is in the plan. It is not the type of verbiage an
21 employee usually uses. They think of themselves as employees
22 versus a participant.

23 Q. Now, you were also questioned about your testimony
24 concerning the 9 percent interest rate?

25 A. Yes.

F7LJOSB2

Ine - redirect

1 Q. I think you said that at the time you thought the 9 percent
2 interest rate was good?

3 A. Yes.

4 Q. What did you mean by that?

5 A. I meant that I thought it was a good rate to use at that
6 time.

7 Q. What was the function of the 9 percent interest rate, as
8 you understood it?

9 A. It was to take the accrued benefit as of 12-30-95 and turn
10 it into a present value for starting up the cash balance
11 account.

12 Q. At the time did you think that 9 percent was an appropriate
13 figure to use to make that conversion?

14 A. I didn't have anything to compare it to, so yes.

15 Q. You assumed that was a correct way to convert the annuity
16 to a lump sum?

17 A. Yes.

18 Q. And am I correct that if the plan was to offer the
19 previously accrued benefit in the form of a lump sum, there had
20 to be some conversion process?

21 MR. GOTTESDIENER: Objection. Objection.

22 THE COURT: Hold on. Overruled. You may answer.

23 THE WITNESS: Can you say that again.

24 BY MR. RUMELD:

25 Q. Did you understand at the time --

F7LJOSB2

Ine - redirect

1 MR. RUMELD: I'll rephrase the question, your Honor.

2 Q. You testified that you were happy that you were able to get
3 your benefit in the form of a lump sum?

4 A. Yes.

5 Q. The benefit you received in the form of a lump sum, did
6 that correspond only to your work post-'96 or also your work
7 pre-'96?

8 A. Only my work pre-'96.

9 Q. It was the lump sum equivalent of what you had earned
10 before '96?

11 A. Correct.

12 Q. Were it not for the cash balance amending, how would you
13 have received that portion of your benefit?

14 A. I wouldn't have received anything. It would have just
15 stayed as an accrued benefit until I became 55 or older.

16 Q. Right. You would have received an annuity sometime in the
17 future?

18 A. Right.

19 Q. Am I correct then that converting that annuity into a
20 starting balance was the process that enables you to take your
21 benefit in the form of a lump sum?

22 A. Yes.

23 Q. Sitting here now, do you know one way or the other whether
24 there is anything, whether there was anything that was wrong
25 using the 9 percent?

F7LJOSB2

Ine - redirect

1 A. With hindsight, it is probably part of the reason why it is
2 going so long before the cash balance annuity actually is more
3 than the pre-'96 annuity.

4 Q. When you say going so long, relative to what?

5 A. Relative to understanding the participant that is being
6 used for this case. My understanding is that he was there
7 seven years and he still got the 12-30-95 benefit.

8 Q. At your deposition you testified about being surprised
9 about certain things Mr. Gottesdiener was representing to you.

10 Can you distinguish between what was not a surprise
11 because you already knew it and what was a surprise to you
12 based on what Mr. Gottesdiener was telling you?

13 MR. GOTTESDIENER: Objection.

14 THE COURT: Overruled. You may answer.

15 A. My surprise was that it continued beyond three years.

16 BY MR. RUMELD:

17 Q. What is the "it"?

18 A. Well, that the old formula was still being used for the
19 lump sum calculation.

20 Q. So am I correct then that if you had been told that for
21 three years after the cash balance amendment, lots of
22 participants had received a benefit that was based on their
23 pre-'96 accruals, that would not have surprised you?

24 Should I try again?

25 A. Yes.

F7LJOSB2

Ine - redirect

1 Q. In your case --

2 A. Yes.

3 Q. -- you left in 1995?

4 A. Correct.

5 Q. Were you surprised your benefit was based on your
6 pre-1995-'96 accruals?

7 A. No.

8 Q. As of that time, would it have surprised you that lots of
9 other people were receiving a benefit based on their pre-1996
10 accruals?

11 A. No.

12 Q. So when you went to your deposition, that fact wasn't news
13 to you?

14 A. Correct.

15 MR. GOTTESDIENER: Objection.

16 THE COURT: Overruled.

17 BY MR. RUMELD:

18 Q. So what was news to you was just that people like
19 Mr. Osberg who left several years later was also getting a
20 benefit based on pre-'96 accrual?

21 MR. GOTTESDIENER: Your Honor, I am sorry.

22 THE COURT: I'll allow it.

23 MR. GOTTESDIENER: None of this was discussed at her
24 deposition.

25 THE COURT: That is okay. It is within the scope of

F7LJOSB2

Ine - redirect

1 her deposition. Frankly, the surprise versus not surprise we
2 have beaten on both sides. I will allow this last question.
3 You may answer. Do you have it in mind or do you want it
4 restated?

5 THE WITNESS: Restate.

6 BY MR. RUMELD:

7 Q. I am trying to understand what was it that you found
8 surprising when you reviewed --

9 A. That it went longer than a few years, a few years.

10 Q. Were you also surprised when you were told that no one was
11 earning anything?

12 A. From the sense of the cash balance account, yes.

13 Q. When you got your benefit in 1999, did you view it as if
14 you hadn't earned anything?

15 A. I didn't because I wanted some settlement. It was
16 something I wouldn't have gotten under the old plan. I wanted
17 to have control of the money by investing it myself.

18 Q. Did you view it in 1999 as if your benefit had been frozen?

19 A. I didn't, no.

20 THE COURT: All right. Thank you.

21 Mr. Gottesdiener. Let me tell people I am now going
22 to be making notes directly into my computer, and so that will
23 be what you see me doing. If you see me typing, that is what I
24 am doing, not looking at e-mail or anything else, just so
25 nobody is concerned for lack of attention.

F7LJOSB2

Ine - recross

1 MR. GOTTESDIENER: The court's indulgence.

2 THE COURT: Yes.

3 RECROSS EXAMINATION

4 BY MR. GOTTESDIENER:

5 Q. While I am setting up here, Ms. Ine, let me ask you a
6 couple of questions about the deposition itself.

7 You were accompanied by two lawyers to the deposition,
8 correct?

9 A. Correct.

10 Q. As you told us already, you prepared with them for four
11 hours before the deposition, correct?

12 A. Correct.

13 Q. In addition, during the deposition we took breaks, right?

14 A. Correct.

15 Q. And you had the opportunity to speak with them on breaks
16 during the deposition, correct?

17 A. Yes.

18 Q. After I finished questioning you, they asked you questions
19 at the deposition, correct?

20 A. Correct.

21 Q. And nothing that you're now saying in response to
22 Mr. Rumeld's questions was elicited from you after I finished
23 questioning you, correct?

24 MR. RUMELD: Objection, your Honor.

25 THE COURT: Overruled.

F7LJOSB2

Ine - recross

1 A. Correct.

2 MR. GOTTESDIENER: If we could get on the screen DX-95
3 that Foot Locker's lawyer showed you and if we could blow that
4 up a bit. If you scroll down.

5 BY MR. GOTTESDIENER:

6 Q. Do you see where it says, "The lump-sum payment indicated
7 above represents the greater of your account balance or a
8 minimum lump sum." Do you see that?

9 A. Yes.

10 Q. Then it says, "The minimum lump sum is determined by
11 multiplying your annual accrued benefit by a factor that is
12 based on the mortality table and interest rate in effect on
13 your benefit payment date," correct?

14 A. Yes, yes.

15 Q. Your focus was on the application of factors?

16 A. Yes.

17 Q. You really didn't have an understanding as to where those
18 factors exactly came from. Is that fair?

19 A. I am not sure what you're asking. I knew they came from an
20 actuary.

21 Q. Okay, you knew they came from an actuary.

22 The actuary caused you to have the belief that the use
23 of the 9 percent factor to start off the initial account
24 balance was that it was a projection. Is that correct?

25 A. Yes.

F7LJOSB2

Ine - recross

1 Q. In response to counsel's questions, you said that it was a
2 present value but, in fact, your belief was that it was a
3 projection of the amount that you would ultimately get if that
4 amount were reinvested and earning a 9 percent rate of return
5 before being discounted to present value, correct?

6 MR. RUMELD: Objection.

7 THE COURT: Hold on. I'll allow it.

8 A. Correct.

9 BY MR. GOTTESDIENER:

10 Q. And you thought that federal law governed the creation of
11 the opening account balance, correct?

12 A. Correct.

13 Q. So the minimum lump sum -- actually, let's turn to your
14 declaration and see what you say in your declaration about the
15 minimum lump sum.

16 Paragraph 8 of your declaration, you say, "During my
17 deposition, I was confused as to how the minimum lump sum was
18 calculated."

19 Do you see that?

20 A. Yes.

21 Q. There is a minimum lump sum that we talked about at the
22 deposition that is derived from the cash balance annuity,
23 correct?

24 A. Yes.

25 Q. And that minimum lump sum is derived from the cash balance

F7LJOSB2

Ine - recross

1 annuity, is described in the summary plan description?

2 A. Yes.

3 Q. Correct?

4 MR. RUMELD: Objection.

5 THE COURT: Overruled.

6 BY MR. GOTTESDIENER:

7 Q. And the summary plan description explains that there are
8 times when the participant will get more than their account
9 balance, correct?

10 A. I believe so.

11 Q. Your testimony in your deposition was that you understand
12 the minimum lump sum to be the same minimum lump sum that is
13 described in the summary plan description that is based not on
14 the 12-31-95 frozen accrued, but the cash balance annuity,
15 correct?

16 A. Could you restate that, please.

17 Q. In the deposition when we talked about this minimum lump
18 sum, you ascribed it to the cash balance annuity and the
19 minimum lump sum described in the SPD, correct?

20 A. If that is what I said in the deposition, then yes.

21 THE COURT: I think he is asking you if you recall
22 saying that. Don't agree with him unless you recall.

23 THE WITNESS: I don't, I don't recall saying that.

24 BY MR. GOTTESDIENER:

25 Q. Here is one way without taking out the deposition, which we

F7LJOSB2

Ine - recross

1 can do, that you know that is the case because it is in your
2 declaration, isn't it?

3 You say in Paragraph 8, do you see where it says, "I
4 realize now that both concepts." You say, "I realize now that
5 both concepts were incorporated into the minimum lump sum
6 calculation," right?

7 A. Right. I think at the time that we had the deposition, I
8 was thinking the cash balance calculation to an accrued benefit
9 was a calculation for lump sum. That is already mixed up that
10 there were two minimum sum calculations.

11 THE COURT: Go ahead.

12 MR. GOTTESDIENER: Please, your Honor.

13 THE COURT: Is it the case that under both the cash
14 balance plan as well as under the prior plan, it is possible
15 that a participant can receive a lump sum?

16 MR. GOTTESDIENER: More than the account, do you mean,
17 your Honor?

18 THE COURT: I am sorry?

19 MR. GOTTESDIENER: Do you mean more than the account
20 balance?

21 THE COURT: No. It is just they couldn't receive a
22 lump sum. It is possible a participant could receive a lump
23 sum under either?

24 THE WITNESS: Yes.

25 THE COURT: As a theoretical matter, putting aside the

F7LJOSB2

Ine - recross

1 greater of?

2 THE WITNESS: Correct.

3 THE COURT: Is Paragraph 8 an attempt to say that you
4 were confusing the calculation of a lump sum that might be
5 possible under the cash balance plan?

6 THE WITNESS: Yes.

7 THE COURT: With the minimum lump sum as that term is
8 used under the prior plan, the greater of minimum lump sum?

9 THE WITNESS: Correct.

10 THE COURT: I see. Okay.

11 BY MR. GOTTESDIENER:

12 Q. So we're agreed that there are two minimum lump sums, one
13 under the cash balance benefit if that is the winner and then
14 the other under the frozen 12-31-95 accrued benefit if that's
15 the winner. Is that fair?

16 A. Technically, yes.

17 Q. I am sorry. What is the technically part?

18 A. We really compared the accrual instead of going through the
19 process of creating two minimum lump sums.

20 Q. Right. Let me see if I can restate what you just said.

21 The way it was done is you compared which was the
22 winning annuity?

23 A. Correct.

24 Q. Because whatever the winning annuity was, that was also
25 going to be the winning lump sum?

F7LJOSB2

Ine - recross

1 A. Correct.

2 Q. Okay. But my question was, you acknowledge that there were
3 two distinct minimum lump sums, correct?

4 A. Correct.

5 Q. Because there were these two distinct formulas that a
6 person had as of 1-1-96?

7 A. Correct.

8 Q. It couldn't be the actual winning accrued benefit once the
9 comparison was done?

10 A. Correct.

11 Q. Now, in your way of thinking of things at the time --

12 THE COURT: At the time of the deposition or back in
13 '96?

14 MR. GOTTESDIENER: Back in the '96 to '99 time-frame.

15 BY MR. GOTTESDIENER:

16 Q. Actually, one question I did want to ask, her Honor was
17 asking you questions that touched on potentially the question:

18 When you left, you had to calculate your benefit to
19 understand that you actually had no accruals, correct?

20 A. Correct.

21 Q. You didn't know that before you actually did the
22 calculation. Is that fair?

23 A. Not that I didn't have an accrual as much as there wasn't
24 an accrual, but it was less than the old plan.

25 Q. You didn't earn any new benefits --

F7LJOSB2

Ine - recross

1 A. Correct.

2 Q. -- is what you discovered only after you actually did the
3 calculation in 1999; is that fair?

4 A. Yes.

5 Q. You agree the average participants wouldn't have been able
6 to do what you did?

7 A. That is true.

8 Q. Back in your thought process, '96, '97, '98, '99, before
9 you do your calculation, you think that federal law, you think
10 first the initial account balance is done in a way that is
11 favorable to participants using a 9 percent projection,
12 correct?

13 A. Correct.

14 MR. RUMELD: Objection.

15 THE COURT: Hold on. Sustained. You need to re-ask.

16 The answer is struck.

17 BY MR. GOTTESDIENER:

18 Q. You believed that the initial account balance was created
19 using a 9 percent factor that projected to age 65?

20 MR. RUMELD: Objection.

21 THE COURT: Overruled. She has actually already
22 answered this question.

23 A. Yes.

24 Q. It is a foundational question.

25 A. Yes.

F7LJOSB2

Ine - recross

1 Q. You also, before it was brought back to a present value --

2 A. Correct.

3 Q. -- you also believed at the time that federal law required
4 the calculation to be done in that way, correct?

5 A. Correct, except for the law didn't require 9 percent. That
6 was what the company selected.

7 Q. No, but I am asking at the time you thought federal law
8 governed the way it was done?

9 A. Yes.

10 Q. And you thought the company was just following federal law
11 when it did that, correct?

12 MR. RUMELD: Objection.

13 THE COURT: Overruled.

14 A. Yes.

15 THE COURT: You can ask another question, but we are
16 going to take a mid-morning break in a question or two.

17 MR. GOTTESDIENER: This is a good time.

18 THE COURT: Let's take our mid-morning break and we'll
19 return in 10 minutes. I want to remind people I need to break
20 at 12:30 to take the criminal matter.

21 (Recess)

22 (Continued on next page)

23

24

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Ine - recross

1 THE COURT: Mr. Gottesdiener, you may proceed, sir.

2 MR. GOTTESDIENER: Thank you, your Honor.

3 BY MR. GOTTESDIENER:

4 Q. In your deposition do you remember we spent a little time
5 on an e-mail that is PX 47. We will get it on the screen.

6 MR. GOTTESDIENER: Can I approach the witness, your
7 Honor?

8 THE COURT: You may.

9 MR. GOTTESDIENER: Does your Honor need another copy?

10 THE COURT: No.

11 BY MR. GOTTESDIENER:

12 Q. This is an e-mail. The subject is present value, and it is
13 a two-part e-mail. In the middle is the one that we started
14 with talking about. It was a question, Marion sent an e-mail
15 to Ellen Glickfield.

16 You know who Ellen is, right?

17 A. Yes, I do.

18 Q. She was a clerk under Marion?

19 A. Yes.

20 Q. And Marion is explaining, this is soon after the
21 conversion, how to talk to people who are asking, if they would
22 like to know what they are going to get paid, that is what you
23 should tell people, right? That's what this e-mail concerns?

24 A. Yes.

25 THE COURT: Let me just see. You need to go back and

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1 establish a foundation with this witness.

2 You may have used it.

3 BY MR. GOTTESDIENER:

4 Q. We talked about this e-mail in your deposition.

5 THE COURT: Have you seen this e-mail before your
6 deposition that you can recall?

7 THE WITNESS: I don't believe so, no.

8 I don't remember it.

9 THE COURT: Then you can ask her questions in terms of
10 whether this is consistent with certain things, but not what
11 the actual e-mail means.

12 MR. GOTTESDIENER: OK.

13 BY MR. GOTTESDIENER:

14 Q. This is consistent, the instruction to give to the account
15 balance to active participants who want to know what they will
16 be paid, that was consistent with the instructions that you had
17 from New York and what you all did when somebody asked that
18 question who was still active?

19 THE COURT: Correct?

20 MR. GOTTESDIENER: Right, yes.

21 Q. Correct?

22 A. In the beginning, because everything was manual, in
23 Milwaukee we were not answering any questions for anybody that
24 was not 50 years old.

25 Q. Right.

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1 A. We couldn't.

2 Q. Sure. But after that period of time, that didn't persist
3 forever?

4 A. No.

5 Q. You then had to field those kinds of questions, right?

6 A. And then we did.

7 Q. And you did. This was consistent with what you did. You
8 told people, you communicated to people who were active their
9 benefit is the account balance. That's what they would get
10 paid. Correct?

11 A. I don't remember that.

12 MR. GOTTESDIENER: Page 168.

13 If you could blow up here at the bottom, line 19 so
14 the witness can see clearly.

15 BY MR. GOTTESDIENER:

16 Q. Exhibit 32 was the same thing that you have in front of
17 you, PX 47. I started asking you --

18 MR. GOTTESDIENER: I am going to try to short circuit
19 this, your Honor, because it goes on for a few pages. First I
20 am just going to be asking, refreshing recollection that I
21 showed this to the witness and we discussed it.

22 So I am saying around the conversion, February 5,
23 there was this e-mail sent by one of the musketeers. Let me
24 back up because I don't know if the Court has heard that.

25 Q. There was a term used for Tom, Marion and Carol, and that

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1 was the Three Musketeers, right?

2 A. Yes.

3 Q. So you remember that in the deposition I went through this
4 e-mail with you?

5 A. Now that you are showing me, yes.

6 MR. GOTTESDIENER: OK. If you could just show the
7 next page of the deposition, just so we can see how that
8 evolved and just walk through. We don't have to repeat
9 everything.

10 If you could continue to scroll down.

11 I asked a question on line 11. I said: So what I
12 want to do is just read this with you and ask you to confirm if
13 this is a correct understanding of what you guys did, what your
14 protocol called for communicating.

15 BY MR. GOTTESDIENER:

16 Q. This refreshes your recollection that I walked through the
17 e-mail with you like that?

18 A. Yes, now that I see it.

19 Q. OK. And then on the next page. Then, after reading the
20 e-mail, at line 15 I asked: "And first of all, is that your
21 understanding of what you guys communicated to people at the
22 time?"

23 And you answered: "Yes."

24 Does that refresh your recollection that you gave that
25 testimony?

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1 MR. RUMELD: Objection, your Honor. That is what she
2 says at the time. That was her testimony.

3 THE COURT: I will allow it.

4 A. At the time, meaning at the beginning of the plan year, as
5 I indicated.

6 Q. OK. That's fine.

7 A. OK.

8 Q. But I am just asking, then there was, I said at the bottom,
9 you'll notice, and you can look at it now directly, the e-mail
10 itself, that Marion is asking Carol and Tom --

11 Who were in effect their superiors, right?

12 A. Correct.

13 Q. -- if she understood their conversation correctly, if my
14 understanding of our conversation is not correct or if you want
15 different information provided to the participant, please let
16 me and Ellen know immediately.

17 Right?

18 A. Yes.

19 MR. GOTTESDIENER: And then if you would turn to the
20 next transcript page. We are now on transcript 171. Now go to
21 the middle of the page. Scroll down a little bit more.

22 BY MR. GOTTESDIENER:

23 Q. OK. And then I am asking at the bottom, "But this is
24 completely consistent with what" --

25 And you started to answer, "Yes"

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1 "-- you recall being told to people?

2 "A. Yes."

3 Here's where I'm trying to arrive:

4 "Q. And the way you understood the benefit worked?"

5 And you answered: "Yes."

6 MR. RUMELD: Objection.

7 THE COURT: I think right now she's just being asked
8 to confirm that this all occurred during the deposition.

9 I have to say --

10 MR. GOTTESDIENER: That's right.

11 THE COURT: -- I do think that it's sufficiently
12 opaque that I am not sure I know what is going on right now.

13 MR. GOTTESDIENER: Right. I am going to try to
14 connect up.

15 THE COURT: All right.

16 MR. GOTTESDIENER: I just --

17 THE COURT: All right.

18 Do you see that you testified to this?

19 THE WITNESS: Yes.

20 THE COURT: OK.

21 BY MR. GOTTESDIENER:

22 Q. At the deposition -- this is not a trick question, this is
23 just foundational -- you said then that this is e-mail was
24 consistent with your understanding of the way the benefit under
25 the amended plan worked, right?

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1 A. Yes.

2 Q. Now, coming forward, looking at the e-mail, you see it
3 says, If the request is from an active associate, provide the
4 account balance. Correct?

5 A. Yes.

6 Q. Now, what I want to review with you is your belief at the
7 time was that was the appropriate information to give a
8 participant, because the conversion, as you understood it, took
9 the 12/31/95 benefit and it did some kind of conversion and it
10 started you off exactly where you left off, correct?

11 A. Correct.

12 Q. So now there was only one real benefit under the plan, and
13 that was your account balance benefit, correct?

14 A. Correct.

15 Q. Your account balance benefit moved forward, and it was real
16 additions to a real benefit that you were getting in exchange
17 for working for the company, right?

18 A. Correct.

19 Q. As the Farah letter and the highlights memo explained, it
20 replaced the prior benefit, and it moved forward in exchange
21 for work giving you additional pension, correct?

22 A. Under the cash balance plan, correct.

23 Q. Under the amended plan, 1/1/96, that was your understanding
24 of the way the benefit worked, right?

25 A. Correct.

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Ine - recross

1 Q. That's one of the reasons --

2 MR. GOTTESDIENER: And I will link this up, your
3 Honor.

4 Q. That's one of the reasons you didn't think of this as a
5 freeze, right?

6 A. Correct. I never thought of it as a freeze.

7 Q. OK. We're almost there. There's a few more steps to this.

8 So what you understood, was, however, that there was a
9 federal law requirement -- remember, we started, I started my
10 examination here after Mr. Rumeld questioned you with one of
11 the documents that you were shown by Mr. Rumeld, it was DX 95?

12 A. OK. The estimate, yes.

13 Q. Do you remember we paused for this digression to get to
14 this point where it says the minimum lump sum is determined by
15 multiplying your annual accrued benefit by a factor, right?

16 A. Correct.

17 Q. And you understood, your focus was on these factors?

18 A. Yes.

19 MR. GOTTESDIENER: Now, if we could get on the screen
20 a demonstrative exhibit that we just put together, which is
21 1543.

22 BY MR. GOTTESDIENER:

23 Q. I want to talk to you to see if I understand what your
24 understanding was at the time, that the cash balance account as
25 we have been discussing, that was the benefit, but at

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1 termination there had to be this greater-of calculation done?

2 A. Correct.

3 Q. And the greater-of calculation done was, it was this MLS
4 the 12/31/95 benefit times a factor, right?

5 A. This is as of termination?

6 Q. Yes.

7 A. Employee termination or retirement?

8 Q. Yeah. Or an estimate if they wanted an estimate?

9 A. As I did --

10 Q. You would do?

11 A. As I indicated before, we would look at the annuity, not
12 the minimum lump sum.

13 Q. Understood. But this is in effect the way you would
14 understand the --

15 A. Yes.

16 Q. It's consistent?

17 A. Yes.

18 Q. And it's consistent with that explanation in DX 95?

19 A. Yes.

20 Q. What you are looking at is it's just times this factor.

21 MR. GOTTESDIENER: If I could move to the next screen.

22 Q. Do you remember we discussed that in the SPD it explains
23 that there are times when you would end up with your benefit
24 was your account and you would get your account as a lump sum,
25 but there would be kind of luck-of-the-draw times where, based

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1 on where interest rates were under federal law, you would have
2 to get more than the account?

3 Do you remember that?

4 A. I --

5 MR. RUMELD: Objection.

6 THE COURT: Hold on. Before you answer, let me just
7 read this question.

8 Why don't you rephrase.

9 MR. GOTTESDIENER: Sure.

10 BY MR. GOTTESDIENER:

11 Q. In the deposition and earlier today we discussed how in the
12 summary plan description there is a disclosure that there are
13 times when you would actually get more than your account
14 balance based on a federal law calculation requirement.

15 A. Correct.

16 Q. And in the deposition I started using, and you agreed with
17 it and we used it as a shorthand, that it was a kind of a
18 luck-of-the-draw calculation as far as you thought of it
19 because it depended on where interest rates were whether or not
20 under that calculation you would do better than the account
21 balance?

22 MR. RUMELD: Objection.

23 Q. Do you recall that?

24 THE COURT: I don't know if "luck of the draw" was
25 used in the deposition, and therefore you're incorporating --

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1 MR. GOTTESDIENER: It was. That was my question.

2 THE COURT: It was?

3 MR. GOTTESDIENER: Yes.

4 THE COURT: Luck of the draw was a phrase you already
5 used in representing that?

6 MR. GOTTESDIENER: Yes.

7 THE COURT: I want to make sure. Otherwise it would
8 be an objectionable question.

9 I will allow it.

10 MR. RUMELD: The question was objectionable then and
11 it's certainly objectionable now.

12 THE COURT: She adopted it. He's represented that she
13 adopted it in her answer.

14 Is that right?

15 MR. GOTTESDIENER: Yes.

16 THE COURT: Was there an objection to form at the
17 time?

18 MR. RUMELD: We would have to look back.

19 THE COURT: Let me see.

20 If there's no objection to form, then it's waived.

21 MR. GOTTESDIENER: But it's still --

22 THE COURT: No. Let me just see if there is an
23 objection to form. It's just the phrase "luck of the draw."
24 You can do it without that. You can say variable.

25 MR. GOTTESDIENER: OK.

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1 THE COURT: And that would I think clear up the issue
2 here.

3 MR. GOTTESDIENER: I will try it that way then.

4 BY MR. GOTTESDIENER:

5 Q. So you do agree that in the SPD you knew at the time that
6 it did explain that under federal law there were times that you
7 would get more than the account number?

8 A. Correct.

9 Q. So let's look at this second slide, and you tell me if I'm
10 understanding the way you understood the benefit worked.

11 The account was the benefit under the plan, and it was
12 the 12/31/95. You see where I have 12/31/95?

13 A. Yes.

14 Q. You started with that full value, right?

15 A. Yes.

16 Q. You understood that you got the full value of that in
17 effect put into your account to start?

18 MR. RUMELD: Objection.

19 THE COURT: I will allow it. She can answer it if
20 that's consistent with her understanding.

21 A. Yes. The starting cash balance, yes.

22 Q. And it was also you said in the deposition you also used
23 the term equal value, correct?

24 A. Yes.

25 Q. So we start with the full value, equal value of what you

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1 already earned and under the only benefit under the plan, you
2 add as time goes on enhancement if you're eligible for that,
3 plus C, compensation credits, plus I, interest credits.

4 Correct?

5 A. Correct.

6 Q. The calculation that you would have to do, however, to see
7 if somebody would get their growing benefit or somebody else
8 would be, you would then have to check -- whether you started
9 by doing it with the annuity or not, you would then have to
10 check whether the MLS was greater, right?

11 A. Greater than what?

12 Q. Greater than the growing account benefit.

13 A. Yes.

14 Q. What you knew was that it was multiplied by a factor that
15 was required by federal law?

16 A. Correct.

17 Q. Just like you thought the initial account balance was
18 governed by federal law and the use of a factor, right?

19 MR. RUMELD: Objection.

20 THE COURT: Overruled.

21 You may answer.

22 A. Yes.

23 Q. What you believed at the time, and I'm not sure -- I'm not
24 asking you what you believe right now, if you believe what you
25 believed then, that's fine. If you believe something

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Ine - recross

1 different, that's not in the question.

2 At the time you thought that there was this federal
3 law requirement that you use some calculation, that you took
4 the old benefit and you multiplied it by this factor, and maybe
5 it would vault over the value of the account balance benefit,
6 and that's what the person was entitled to as a matter of
7 federal law, right?

8 A. Correct.

9 MR. RUMELD: Objection.

10 THE COURT: Overruled.

11 Q. That's why you didn't think of any of this as a freeze,
12 correct?

13 A. Correct.

14 Q. Because you were --

15 THE COURT: Wait. Do you want to have an answer after
16 the word correct. You said correct. Now you're asking a new
17 question.

18 MR. GOTTESDIENER: She said correct.

19 THE COURT: You said correct?

20 THE WITNESS: Yes.

21 THE COURT: I'm sorry. I thought that was you saying
22 it. OK. Let me just make sure. And the court reporter got it
23 correctly.

24 OK. Thank you. You may proceed. It was going
25 quickly. If you could slow it down a little bit.

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Ine - recross

1 BY MR. GOTTESDIENER:

2 Q. So, in the end this is all, while complicated, it's all
3 kind of simple insofar as the account was the benefit, this MLS
4 where people ended up getting more was an additional federal
5 mystery calculation that sometimes just gave people a gift of
6 even more, even though it was based on the old benefit?

7 Correct?

8 MR. RUMELD: Objection.

9 THE COURT: Sustained.

10 Q. You thought that what this MLS calculation was doing was
11 boosting the 12/31/95 benefit in some cases when somebody got
12 that over what people were earning under the account balance
13 benefit, correct?

14 MR. RUMELD: Objection.

15 THE COURT: Overruled.

16 A. Yes.

17 MR. GOTTESDIENER: No further questions.

18 THE COURT: Thank you.

19 Just so it's clear, this is going to be the last round
20 we are doing with this witness. All right.

21 So make it short and tight, but I don't want to have
22 this be like an endless cycle.

23 MR. RUMELD: All right. I have the same objective.
24 Five minutes.

25 THE COURT: Terrific.

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Ine - redirect

1 MR. RUMELD: I just think I need to --

2 THE COURT: I'm not precluding you from doing that.

3 It's really meant for Mr. Gottesdiener that it's not going to
4 be an endless round robin.

5 REDIRECT EXAMINATION

6 BY MR. RUMELD:

7 Q. When a participant terminates employment and asks for a
8 minimum lump sum, there is a calculation that has to be made,
9 correct?

10 A. Correct.

11 Q. And for purposes of performing the minimum lump sum
12 calculation, how is that done?

13 THE COURT: Let's just make sure.

14 Do you want it as her understanding?

15 Let me ask this prefatory question. Is your
16 understanding as to how the minimum lump sum is calculated
17 different today from how it was back in the '96/'97/'98 time
18 frame, or do you believe your view to be the same?

19 THE WITNESS: They are the same.

20 THE COURT: All right. You may proceed, sir.

21 MR. RUMELD: OK.

22 BY MR. RUMELD:

23 Q. If I understand your declaration and your testimony, you
24 derived that minimum lump sum from the accrued benefit, is that
25 right?

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Ine - redirect

1 A. Correct.

2 THE COURT: I'm going to ask you not to lead because
3 of this line of questioning.

4 MR. RUMELD: OK.

5 THE COURT: I understand that --

6 MR. RUMELD: I'm trying to meet my five-minute
7 commitment.

8 THE COURT: You can do more than five minutes. I just
9 don't want you to lead.

10 MR. RUMELD: OK.

11 BY MR. RUMELD:

12 Q. So tell us again how did you arrive at that minimum lump
13 sum that's calculated when the participant leaves employment?

14 A. The accrued benefit for the cash balance account is
15 calculated, and that is compared to the accrued benefit as of
16 12/30/95, whichever is higher is what is used to calculate the
17 minimum lump sum.

18 Q. So the accrued benefit from before '95, that's -- in what
19 form is that? Is it an annuity or lump sum? I'm sorry. From
20 before '96.

21 A. Oh, before '96 it was an annuity.

22 Q. So that one is already in the form of an annuity?

23 A. Correct.

24 Q. The cash balance account you changed to an annuity to
25 compare it to the old benefit, is that right?

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Ine - redirect

1 A. Made it apples and apples, correct.

2 Q. Right. And to make it apples to apples --

3 THE COURT: Don't lead this part.

4 MR. RUMELD: OK.

5 BY MR. RUMELD:

6 Q. How do you go about making it apples to apples?

7 A. You take the cash balance account and convert it from a
8 present value to a future value.

9 Q. Right.

10 A. Based on the person's age and mortality tables and then
11 it's brought back -- it's turned into a projection of an
12 annuity.

13 Q. OK. For purposes of doing that math, the factors that are
14 used for that, are they governed by federal law?

15 MR. GOTTESDIENER: Objection.

16 THE COURT: Sustained. Ask it in a nonleading -- ask
17 it a little bit differently.

18 Q. Is it your understanding --

19 THE COURT: Where did the factors come from?

20 MR. RUMELD: OK.

21 BY MR. RUMELD:

22 Q. You mentioned a mortality assumption?

23 A. Yes.

24 Q. Where does that come from?

25 A. We have tables that were provided.

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Ine - redirect

1 Q. OK.

2 A. To use looking at the person's age.

3 Q. And --

4 A. And to the normal retirement date.

5 Q. Do you know whether those assumptions are legally required?

6 A. Yes, they are.

7 Q. Are there other factors that you apply to take that cash
8 balance account and move it into a age 65 annuity?

9 A. Not that I can think of right now.

10 Q. Then you said you compare the two annuities?

11 A. Correct.

12 Q. And one of those two annuities is larger?

13 A. Correct.

14 Q. Then what do you do to the larger annuity to calculate the
15 minimum lump sum?

16 A. Then we take the larger annuity, and we use the rate for
17 the T bills in that year and use that to calculate a minimum
18 lump sum.

19 Q. The use of those T bills, did you have an understanding as
20 to whether that was legally required?

21 A. That would be what?

22 Q. Legally required.

23 A. Yes.

24 Q. Using those treasury bill rate, that was a legal
25 requirement?

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Ine - redirect

1 A. That's how I understood it.

2 Q. And that's how you understood it back then?

3 A. Yes.

4 Q. Now let's put that calculation aside and talk about the
5 calculation of the initial account balance. How was that done?

6 A. That's taking the annuity and using a 9 percent factor.

7 THE COURT: The winning annuity.

8 THE WITNESS: I'm sorry. The 12/30/95 annuity. And
9 using a 9 percent factor which the company elected to use to
10 calculate a start cash balance.

11 Q. So in your response you said the company elected to use the
12 9 percent --

13 A. Yes.

14 Q. -- factor. What did you mean by that?

15 A. It's my understanding that the federal requirements were
16 less than the 9 percent factor.

17 Q. So was it your understanding that the use of the 9 percent
18 factor was legally required?

19 A. No.

20 Q. That was just something the company chose?

21 A. Yes.

22 Q. And you understood that at the time?

23 A. Yes.

24 MR. GOTTESDIENER: Objection.

25 THE COURT: Overruled.

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Ine - redirect

1 Q. So is it fair to say that you understood at the time --

2 THE COURT: Don't do it's fair to say with your own
3 witness. The reason for that is, it may be perfectly fair, but
4 I don't want him to lead you. I want to hear your testimony
5 directly. So he'll ask you a nonleading question.

6 MR. RUMELD: OK. Let me try it this way.

7 BY MR. RUMELD:

8 Q. At the time what was your understanding as to the
9 relationship between the rate that the company chose to use for
10 purposes of calculating the initial lump sum, the initial
11 account balance, excuse me, and the rate that was legally
12 required for purposes of calculating the minimum lump sum?

13 MR. GOTTESDIENER: Objection.

14 THE COURT: I will allow it. You may answer.

15 A. It was my understanding that that was the rate that the
16 actuaries felt we would get if we took the lump sum or if we --
17 yes, if we took the money, the cash balance account, and took
18 it ourselves and went out and invested it that we could get at
19 least 9 percent.

20 Q. Just so we're clear, which rate are you referring to now,
21 the 9 percent?

22 A. Yes.

23 Q. In response to Mr. Gottesdiener's questioning you said that
24 your understanding at the time was that the cash balance
25 account was the only benefit you could get under the plan?

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Ine - redirect

1 MR. GOTTESDIENER: Objection.

2 THE COURT: Hold on.

3 Sustained.

4 BY MR. RUMELD:

5 Q. What was the relevance of the benefit under the prior plan
6 when you were calculating a participant's benefit?

7 A. It was made clear that the benefit under the cash balance
8 account would never be less than what you could get under the
9 old plan.

10 Q. So did you view what you could get under the old plan as a
11 benefit under the new plan, or just a benefit under the old
12 plan that needed to be compared to the benefit under the new
13 plan?

14 MR. GOTTESDIENER: Objection.

15 THE COURT: I will allow it.

16 A. To me it was a comparison that made sure that the
17 participant did not get less than what they were entitled to
18 under the old plan.

19 Q. Do you still have in front of you Defendant's Exhibit 95,
20 which was that estimate that we looked at a little while ago?

21 Do you have that?

22 A. Yes.

23 Q. Could we look at Defendant's Exhibit 37, which is the
24 summary plan description.

25 MR. RUMELD: I need another copy. Can I hand a copy

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Ine - redirect

1 up, your Honor.

2 THE COURT: Yes. I've got one.

3 MR. RUMELD: I was sure you did.

4 THE COURT: But if you want to give the witness one.

5 BY MR. RUMELD:

6 Q. Could you turn to page 12 of the SPD.

7 A. Yes.

8 Q. I should ask first, do you recognize this document?

9 A. Yes.

10 Q. Do you want to tell the Court what it is.

11 A. The summary plan description that describes the benefit
12 program.

13 Q. Which benefit program specifically?

14 A. The 1996 plan, the cash balance.

15 Q. You see in the end of the first paragraph at page 12 it
16 says, The lump sum payable to you is the greater than your
17 account balance or the amount determined by multiplying the
18 annuity payable to you by factors required by federal law and
19 IRS regulations?

20 A. Yes.

21 Q. How does your understanding of that sentence compare to
22 your understanding of the second sentence of that middle
23 paragraph that we read before: The minimum lump sum is
24 determined by multiplying your annual accrued benefit by a
25 factor that is based on the mortality table and interest rate

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Ine - redirect

1 in effect on your benefit payment date?

2 THE COURT: This is DX 95?

3 MR. RUMELD: Correct. Thank you.

4 A. They are both saying that it is a calculation using the
5 annual accrued benefits. It isn't -- well, the SPD says if
6 it's greater than your account balance or multiplying the
7 annuity payable.

8 It adds a little more information than the estimate,
9 which is talking about just multiplying your annual accrued
10 benefit by a factor. It doesn't indicate that -- which, you
11 know, it's the higher of the two.

12 MR. RUMELD: OK. Thank you.

13 I have nothing further.

14 THE COURT: Thank you. Mr. Gottesdiener, one
15 question.

16 RECROSS EXAMINATION

17 BY MR. GOTTESDIENER:

18 Q. When you were being asked by Mr. Rumeld about the initial
19 account balance and your understanding of the 9 percent, you
20 said something that I think needs to be highlighted.

21 You said federal requirements were less than 9 percent
22 was your understanding, correct?

23 A. Yes.

24 Q. What you meant by that was the company was doing a favor?
25 It did not have to go as high as 9, which was favorable, it was

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Ine - redirect

1 required to use what the federal government set as some lower
2 number, correct?

3 A. Correct.

4 THE COURT: All right. Thank you.

5 OK. You can step down, Ms. Ine.

6 THE WITNESS: Should I take this with me?

7 THE COURT: You can just leave everything there.

8 THE WITNESS: OK.

9 THE COURT: Be careful stepping off the witness stand.

10 (Witness excused)

11 THE COURT: All right. Mr. Gottesdiener, your next
12 witness, please, sir.

13 MR. GOTTESDIENER: Yes, your Honor.

14 Mr. Schaeffer is a class member.

15 THE COURT: All right. Mr. Schaeffer, please.

16 MR. GOTTESDIENER: We are calling him because he can't
17 be here any other day.

18 THE COURT: We're going to get to Ms. Peck as well?

19 MR. GOTTESDIENER: Yes.

20 THE COURT: All right. Let's get to Mr. Schaeffer.
21 Hopefully if he's here we can proceed. He's here so I won't
22 say any more. All right.

23 RICHARD SCHAEFFER,

24 called as a witness by the Plaintiffs,

25 having been duly sworn, testified as follows:

F7lnosh3

Schaeffer - cross

1 THE COURT: Mr. Shaver, please be seated, sir. It
2 will be important for just to pull your chair up to the
3 microphone and adjust the microphone so you can speak into it
4 clearly.

5 Sometimes you have to find that sweet spot. You want
6 to be close but not too close.

7 All right. You may proceed.

8 MR. CLARK: Good morning, Mr. Schaeffer.

9 THE WITNESS: Good morning.

10 THE COURT: We have his declaration.

11 Mr. Schaeffer, why don't you look through this
12 declaration and confirm for me, if you would, please, sir, that
13 that is in fact the declaration of yourself and that you expect
14 it would be your direct trial testimony in this matter?

15 THE WITNESS: Yes, this is it.

16 THE COURT: All right.

17 Do you swear to the truth of the contents of that
18 declaration.

19 THE WITNESS: Yes.

20 THE COURT: All right.

21 The Court does accept the declaration of Mr. Schaeffer
22 as his direct trial testimony, and the witness is turned over
23 to Mr. Clark for cross-examination.

24 CROSS EXAMINATION

25 BY MR. CLARK:

F7lnosh3

Schaeffer - cross

1 Q. Mr. Schaeffer, you worked for Woolworth in the Mid-Atlantic
2 distribution center, is that correct?

3 A. Correct.

4 Q. That was in Denver, PA.?

5 A. Yes.

6 Q. That plant closed in 1997?

7 A. Yes.

8 Q. Before the distribution center closed, you hadn't
9 considered leaving Woolworth, correct?

10 A. No.

11 Q. And after it closed, it took you about six months to find
12 another job?

13 A. Yes.

14 Q. And you went to work for Elixir Industries?

15 A. Yes.

16 Q. And when you went to work for Elixir you took a pay cut,
17 right?

18 A. Yes.

19 Q. About \$4 an hour?

20 A. Close to that.

21 Q. Do you still work at Elixir today?

22 A. Yes.

23 Q. Elixir does not offer a pension plan, does it?

24 A. No, it does not.

25 Q. Just a 401(k)?

F7lnosh3

Schaeffer - cross

1 A. Yes.

2 Q. Do you recall in 1995 and 1996 the Woolworth pension plan
3 underwent a conversion?

4 A. Yes.

5 Q. At the time of the conversion retirement wasn't something
6 you were really focused on --

7 A. Not at the time, no.

8 Q. -- right?

9 MR. CLARK: May I approach, your Honor?

10 THE COURT: You may.

11 Q. I'm showing you what's been marked as DX 20.

12 THE COURT: All right. Also PX 2.

13 MR. HUANG: That's correct.

14 THE COURT: I am just cross-referencing. We have two
15 different numbers for the same document.

16 You may proceed, Mr. Clark.

17 BY MR. CLARK:

18 Q. We looked at that document during your deposition, correct?

19 A. Correct.

20 Q. And you testified that you didn't remember receiving this
21 document, right?

22 A. I don't remember this document, no.

23 Q. Do you recall anyone ever mentioning it to you at the time
24 of the conversion?

25 A. In 1995?

F7lnosh3

Schaeffer - cross

1 Q. Yes.

2 A. I don't recall it, no.

3 MR. CLARK: May I approach, your Honor?

4 THE COURT: You may.

5 MR. CLARK: This is DX 29. I think it's PX 4.

6 THE COURT: All right.

7 BY MR. CLARK:

8 Q. Have you had a chance to look at DX 29?

9 A. I remember this one, yes.

10 Q. We also looked at this document during your deposition,
11 right?

12 A. Correct.

13 Q. And you recall receiving this document?

14 A. I do this one, yes.

15 Q. You remember reviewing it?

16 A. Yes.

17 Q. If you could take a look at the bottom of the first page.
18 There is a definition there for the term initial account
19 balance.

20 Do you see that?

21 A. Yes.

22 Q. I am just going to read the definition.

23 Initial account balance: Your accrued benefit as of
24 December 31, 1995 is actuarially converted to an initial
25 account balance.

F7lnosh3

Schaeffer - cross

1 You understood at the time of the conversion that
2 there were a number of steps that needed to be taken to
3 actuarially convert something, right?

4 A. Yes.

5 Q. You understood that these steps involved an application of
6 some factor and the mortality rate from which you would get a
7 figure, right?

8 A. Yes.

9 Q. Also at the time you wouldn't have known or understood the
10 term actuarial convert to mean equal, right?

11 A. Probably not at the time.

12 MR. CLARK: May I approach?

13 THE COURT: You may.

14 MR. CLARK: I'm handing the witness DX 37.

15 I believe you have a copy, your Honor.

16 THE COURT: All right.

17 (Continued on next page)

F7LJOSB4

Schaeffer - redirect

1 Q. Do you recognize that document?

2 A. I do recognize it, yes.

3 Q. And again we also reviewed this document during your
4 deposition?

5 A. Correct.

6 Q. This is the sort of document that upon receiving it, you
7 would have glanced through it, right?

8 A. I would have looked at it, yes.

9 Q. You don't recall focusing more specifically on this summary
10 plan description simply because it followed the cash balance
11 conversion, right?

12 A. I am not sure what you mean.

13 Q. If you look to the very back page of the SPD, so you see a
14 date on the bottom right?

15 A. Yes.

16 Q. What is the date?

17 A. September 30th, 1996.

18 Q. And the plan was converted on January 1st, 1996 back to
19 January 1, 1996?

20 A. Yes.

21 Q. You don't recall focusing more specifically on this SPD as
22 opposed to others simply because how close to the time of the
23 conversion it was released?

24 A. Right.

25 Q. If you could turn to Page 6 of the SPD. The page within

F7LJOSB4

Schaeffer - redirect

1 the section of the definitional terms, do you see the term,
2 "Initial Account Balance" --

3 A. Yes.

4 Q. -- around the middle of the page?

5 You don't actually remember reading the definition of
6 that term at the time that you converted, right?

7 A. I don't remember, no.

8 Q. If you could turn to Page 14 -- actually, start with Page
9 13, please. So we're within the section, "How Your Retirement
10 Benefit is Determined"?

11 A. Yes.

12 Q. And this page appears to be describing compensation
13 credits, right? Do you see that?

14 A. Yes.

15 Q. In essence, this is describing how credits will be added to
16 your account, your account balance will be increased by credits
17 that are a portion of the compensation you earned, right?

18 A. Yes.

19 Q. Did you have an understanding at the time that that is how
20 your account balance would increase?

21 A. Yes.

22 Q. So, in essence, increases to your cash balance account were
23 based in part on your salary?

24 A. Correct.

25 Q. Because of this, this was the sort of thing that employees

F7LJOSB4

Schaeffer - redirect

1 generally really wouldn't discuss, right?

2 A. Right.

3 Q. Because I believe you testified that employees generally
4 didn't discuss their pension benefits because those were based
5 on their wage and salary, right?

6 A. Yes. There is a difference there. The warehouse people,
7 of which I was a part of for many years, all earned the same
8 money so they knew what others were making. When I moved up to
9 the rebuying area, there it was totally different. There it
10 was not discussed. So yes and no.

11 Q. So in the position you were at at the time of the
12 conversion, were you in the rebuying area at the time of the
13 conversion?

14 A. Yes.

15 Q. At that point in time the employees you worked with
16 generally didn't discuss their pension benefits because it was
17 based on their salary?

18 A. Correct.

19 Q. In Paragraph 9 of your declaration, you referred to a
20 letter that Marion Derham sent you?

21 A. Yes.

22 Q. This is PX-390. Do you have a copy of it?

23 A. Yes.

24 MR. CLARK: Your Honor, would you like a copy?

25 THE COURT: That might be easier, yes.

F7LJOSB4

Schaeffer - redirect

1 (Pause)

2 BY MR. CLARK:

3 Q. Do you recognize this document?

4 A. Yes.

5 Q. Now, in your declaration you characterized that September
6 11th letter. Just for clarity, if you turn to the second page
7 of the document, do you see it is dated September 2nd, 1997?

8 A. Yes.

9 Q. Actually the cover page, the first page of the document, do
10 you see that's a note from somebody to Marion Derham, to Carol?

11 MR. GOTTESDIENER: Objection.

12 A. Yes.

13 THE COURT: Overruled.

14 BY MR. CLARK:

15 Q. It says, "Carol, attached for your reference is a copy of
16 the" -- redacted -- "letter I referred to in my 0V note to
17 Don." Do you see that?

18 A. Yes.

19 Q. Do you know who Don is?

20 A. No idea.

21 Q. If you look at the first paragraph of the letter --

22 THE COURT: Could I just ask, is this letter -- I
23 haven't gone back to look, Mr. Schaeffer -- is this a letter
24 you received?

25 THE WITNESS: Yes.

F7LJOSB4

Schaeffer - redirect

1 THE COURT: So you believe that the September 2nd,
2 1997 letter was addressed to you personally?

3 THE WITNESS: Yes, I do.

4 THE COURT: Thank you. You may proceed.

5 BY MR. CLARK:

6 Q. If you look at the first paragraph of the letter, it says,
7 "As requested during our July 28, 1997 telephone conversation,
8 the attach sheets provide you and Denise with a breakdown of
9 the calculation done to arrive at your account balance as of
10 January 1, 1997 under the Woolworth retirement plan."

11 Do you see that?

12 A. Yes.

13 Q. And Denise is Mrs. Schaeffer?

14 A. Yes.

15 Q. Do you recall what your specific request was to
16 Mrs. Derham?

17 A. Not specifically, no.

18 Q. Do you have any reason to doubt that you requested a
19 calculation of your account balance as of January 1, 1997?

20 A. Knowing me, I probably just wanted to know the figure that
21 I might be receiving or will be receiving when both my wife and
22 I were let go.

23 THE COURT: Does that mean that you were just asking
24 for your retirement benefit generally?

25 THE WITNESS: Generally, yes.

F7LJOSB4

Schaeffer - redirect

1 THE COURT: So you don't recall whether or not you
2 focused on any particular way of defining that retirement
3 benefit?

4 THE WITNESS: No.

5 THE COURT: All right.

6 THE WITNESS: We were both losing our jobs. I wanted
7 to know if I needed money to fall back on, what I would have
8 available.

9 THE COURT: Thank you.

10 THE WITNESS: That is the way I am.

11 BY MR. CLARK:

12 Q. You said you wanted to know if had money to fall back on?

13 A. Yes.

14 Q. Had this letter contained an estimate that was inaccurately
15 high, how would you have reacted to that?

16 MR. GOTTESDIENER: Objection.

17 THE COURT: Sustained.

18 BY MR. CLARK:

19 Q. In your declaration, at Paragraphs 6 through 7, you say
20 that you were led to believe that your benefit was your account
21 balance and that it would keep growing.

22 Am I summarizing that fairly?

23 A. Yes.

24 MR. GOTTESDIENER: Objection.

25 THE COURT: Hold on. I'll allow it.

F7LJOSB4

Schaeffer - redirect

1 THE COURT: You can go to your next question. Thank
2 you.

3 BY MR. CLARK:

4 Q. In your deposition you testified that you believed there
5 was -- I believe there was deception in the way that the
6 account balances were calculated because --

7 MR. GOTTESDIENER: Can we get a page and line, please.

8 MR. CLARK: Sure, 38, 1 through 9, of Mr. Schaffer's
9 deposition.

10 MR. GOTTESDIENER: Objection.

11 THE COURT: Well, I think that the better way of
12 approaching it, before we get to the deposition, ask him a
13 question and see if he contradicts himself. If he does, you
14 can impeach him with the deposition. Otherwise, you may not
15 need to get there. These are technical things, Mr. Schaeffer.

16 You worry about whatever question comes to you, you
17 answer it truthfully and honestly.

18 BY MR. CLARK:

19 Q. You believe that you were deceived into thinking that a 9
20 percent interest rate used to calculate your initial account
21 balance was actually interest that you were going to earn on
22 your cash balance account, right?

23 A. Yes.

24 Q. But you don't actually remember the definition of initial
25 account balance in the summary plan description, right?

F7LJOSB4

Schaeffer - redirect

1 A. Back at that time, no, I don't remember.

2 Q. In fact, it was this letter from Ms. Derham, PX-390, that
3 was the first time you ever recall seeing anything about the 9
4 percent rate, right?

5 A. I don't know. I don't know when the first time was I saw
6 it.

7 Q. If you could turn to the page with -- Page 4, Bates number
8 FLOSB 007603. Look at the bottom right of PX-390, the letter
9 from --

10 A. Which page?

11 Q. The one ending 7603.

12 A. Okay.

13 Q. Could you read the first sentence starting with on the last
14 day.

15 A. (Pause)

16 Q. "On the last day of each plan year, account balances, as of
17 the first day of that plan year, are credited with interest at
18 the rate of 6 percent (half percent per month)."

19 Would you have read that at the time, that sentence?

20 A. I would have read it, yes.

21 Q. If you look further down, do you see there is a calculation
22 of adding credits to your account balance?

23 A. Yes.

24 Q. Do you see the line for interest credits?

25 A. Yes.

F7LJOSB4

Schaeffer - redirect

1 Q. Would you tell me what the interest rate there is.

2 A. 6 percent.

3 Q. Is there anything on this page that says 9 percent?

4 A. Not on this page, no.

5 Q. But you still thought that your account balance was growing
6 at an interest rate, being credited with 9 percent interest,
7 right?

8 A. At this time probably not because it said 6 percent.

9 Q. So after reading this letter, you understood that your
10 account balance was actually growing with 6 percent interest
11 credits, is that what you're saying?

12 A. In 1996, yes.

13 Q. When you left Woolworth, you elected a lump sum, right?

14 A. Correct.

15 Q. And you thought being able to do so was a good idea by the
16 company, right?

17 A. Yes.

18 Q. You also thought the 401 (k) plan was a good idea?

19 A. Yes.

20 Q. You participated in the 401 (k) plan, right?

21 A. Correct.

22 MR. CLARK: I have no further questions.

23 THE COURT: Thank you. Mr. Gottesdiener.

24 MR. GOTTESDIENER: Thank your Honor.

25 RECROSS EXAMINATION

F7LJOSB4

Schaeffer - recross

1 MR. GOTTESDIENER: Could I get PX-390 on the screen.
2 That is the Marion Derham letter. The second page, please, if
3 you could blow that up at the fourth paragraph, "to convert."

4 BY MR. GOTTESDIENER:

5 Q. First of all, you were looking for not, I'm assuming, four
6 pages of complicated actuarial discussion of benefits? You
7 wanted to know how much you were going to be paid because you
8 were losing your job?

9 MR. CLARK: Objection.

10 THE COURT: Sustained. You need to rephrase.

11 BY MR. GOTTESDIENER:

12 Q. When you received this letter, what was your focus in
13 reviewing the letter?

14 A. I'm probably thinking I went to the last page to see what
15 the figure was and then went over it.

16 Q. Do you think you understood everything in this letter when
17 you read it?

18 A. Everything, no.

19 Q. Were you trying to understand it?

20 A. Yes.

21 Q. When you looked at the first page, you testified that at
22 some point you thought that the 9 percent was what you were
23 being credited. Do you see on the first page in that paragraph
24 that I asked Randall there to highlight, do you see where it
25 says, "The actuarial equivalent, the term actuarial equivalent

F7LJOSB4

Schaeffer - recross

1 lump sum for present value means what the benefit payable to
2 you at age 65 is worth today"?

3 A. Yes, I see that.

4 Q. Did you read that sentence at the time?

5 A. I'm sure I did.

6 Q. Did you have any understanding from reading that sentence
7 and the rest of the letter different from what you say in your
8 declaration, that you believed that you had been given full
9 value at the point of conversion for what you had earned to
10 date?

11 A. I thought I had.

12 Q. Did the letter make you suspicious in any way, in any way
13 in September 1997 that something other than that had happened?

14 A. No.

15 Q. You have a friend Gregg Stauffer. Is that right?

16 A. Yes.

17 Q. He was in essentially your situation as well, worked with
18 you?

19 A. Yes.

20 Q. And he lost his job as well?

21 A. Correct.

22 Q. Let me have on the screen PX 1234.

23 MR. GOTTESDIENER: May I approach the witness, your
24 Honor?

25 THE COURT: You may.

F7LJOSB4

Schaeffer - recross

1 MR. GOTTESDIENER: This is for the court in case the
2 court doesn't have it yet.

3 BY MR. GOTTESDIENER:

4 Q. Your deposition occurred recently, right?

5 A. About a month ago.

6 Q. When you came to New York, you took time off from work to
7 come to New York to be deposed, also to be a witness in this
8 case today, correct?

9 A. Correct.

10 Q. And you brought with you some documents that Gregg gave you
11 just before you got on the train. Is that fair?

12 A. Yes.

13 Q. This PX-1234, this is a reproduction of what it is that you
14 gave me. Is that fair?

15 A. Yes.

16 Q. You didn't have a copy of this benefits transition
17 information kit in your own possession, but did you receive
18 something like this?

19 A. I'm sure I did.

20 Q. When you received it, would you have reviewed it?

21 A. Yes.

22 Q. Now, if you look at FLPL 3106, do you see where it
23 describes your retirement plan?

24 A. Yes.

25 Q. And where it states, "If you are vested in the retirement

F7LJOSB4

Schaeffer - recross

1 plan, your account balance as of January 1, 1997 is shown on
2 your personal benefits form in this kit. The final benefit
3 amount payable will be determined as of your actual date of
4 termination."

5 Do you see that?

6 A. Yes.

7 Q. Was that consistent with your understanding as to what the
8 benefit was under the plan, your account balance?

9 A. Yes.

10 Q. If you look at FLPL 3109, do you see the company's there
11 saying your vested account balance as of January 1, 1997 is in
12 Gregg's case \$6,000 and change?

13 A. Yes.

14 Q. Is this consistent with the information that you believe
15 you were given at the time you were informed the plan was
16 closing?

17 A. Yes.

18 Q. For yourself?

19 A. Yes, I believe so.

20 MR. CLARK: Objection.

21 THE COURT: Let me just say that is it your best
22 recollection, Mr. Schaeffer, that the sentence up to but not
23 including the amount was the same in the materials you
24 received, but that this amount refers to your friend?

25 THE WITNESS: This amount refers to him, yes. Mine

F7LJOSB4

Schaeffer - recross

1 was similar to this, but mine would have had my information on
2 it.

3 THE COURT: I'll allow it.

4 MR. CLARK: The objection is this is beyond the scope.

5 THE COURT: It is not. It is fairly within the scope
6 because the scope related to what he received and what he
7 thought he was going to receive. The document wasn't used, but
8 the topic was certainly covered, so I'll allow it.

9 We do, Mr. Gottesdiener, have to end at 12:30. I will
10 end up giving Mr. Clark some additional time, so if you want to
11 get this witness off the stand before 2:00, you need to tie it
12 up soon.

13 MR. GOTTESDIENER: Yes.

14 BY MR. GOTTESDIENER:

15 Q. So the answer to the last question is "correct," or you
16 don't have it in mind any more?

17 A. Yes, I received something like this with my personal
18 information on it.

19 Q. Just to speed things along, your personal information, if I
20 direct your attention to PX-390, your number would have been
21 almost the same as his?

22 If you look at Page 3, would you agree that the
23 initial -- I am sorry -- not Page 3 -- the Page 4, yours was a
24 little higher than his?

25 A. Correct.

F7LJOSB4

Schaeffer - recross

1 Q. 7800?

2 A. Right.

3 Q. And that's what you thought at the time was your benefit
4 under the plan?

5 A. Yes.

6 Q. Did you think you had any other benefit or there was any
7 other basis for you being paid something?

8 A. No.

9 MR. GOTTESDIENER: The court's indulgence.

10 (Pause)

11 BY MR. GOTTESDIENER:

12 Q. What was the bottom line, if there was one, that you got
13 out of reading the Derham letter which she sent you?

14 A. The bottom line, the dollar figure that I would be getting.

15 Q. Was there a dollar figure that she gave you?

16 A. Not that I would be getting after we were let go in August
17 or September, no, that would be coming later.

18 Q. Was it your understanding that this calculation would
19 increase your account balance?

20 A. Yes.

21 Q. But it could be less than your account balance?

22 A. Correct.

23 Q. Your declaration says that you remember being very confused
24 by all the interest rates mentioned in the communications, and
25 you point out that Ms. Derham's letter referenced three

F7LJOSB4

Schaeffer - redirect

1 different rates, 9 percent, 6.55 and 6 percent?

2 A. Yes.

3 Q. Did you think the 9 percent rate was a good, a bad or an
4 indifferent rate for the purposes of your benefit?

5 A. I thought it was a good rate.

6 MR. GOTTESDIENER: No further questions.

7 THE COURT: Thank you. Mr. Clark.

8 REDIRECT EXAMINATION

9 BY MR. CLARK:

10 Q. Mr. Schaeffer, I think you testified that when reviewing
11 PX-390, your practice would have been to look at the last page
12 and get the bottom line and take it from there?

13 A. Yes.

14 Q. Could you turn to the last page of the document -- rather
15 the page ending 7604.

16 A. Okay.

17 Q. I don't know if your copy has a separate calculation or
18 7604 is the very last page?

19 A. It is that one.

20 Q. That is the last page of the document, right?

21 A. Yes.

22 Q. Does it tell you your bottom-line benefit?

23 A. No.

24 Q. It actually says the lump sum payable at termination of
25 employment is the greater of the account balance or a minimum

F7LJOSB4

Schaeffer - redirect

1 lump sum, right?

2 A. Yes.

3 Q. Would you have read that at the time?

4 A. I would have, yes.

5 Q. Do you recall what your understanding was of that at the
6 time?

7 A. I would probably have thought I was getting at least \$7800
8 plus, you know, the half year more that I worked, so it would
9 have been at least that much.

10 MR. CLARK: May I approach?

11 THE COURT: You may.

12 MR. CLARK: This is DX-363.

13 THE COURT: All right.

14 (Off-the-record discussion)

15 THE COURT: It has to be on the record. You are
16 saying this was produced in unredacted form?

17 MR. CLARK: It was produced in unredacted form during
18 the discovery that went on in June, but they will be redacted
19 for the purposes of filing with the court.

20 THE COURT: Before we finalize the exhibits, the
21 social security number in particular will be redacted.

22 Thank you.

23 BY MR. CLARK:

24 Q. Do you recognize this document, Mr. Schaeffer?

25 A. Yes.

F7LJOSB4

Schaeffer - redirect

1 Q. Would you explain what it is.

2 A. It is Union Central was the insurance company, the
3 investment firm that I turned my money over to from the
4 Woolworth plan.

5 Q. If you look at the bottom, there is an X next to the
6 lump-sum payment option?

7 A. Yes.

8 Q. Is that the lump-sum benefit that you received from
9 Woolworth, the \$14,245.00?

10 A. Yes.

11 Q. That's \$5,200 more than the account balance on PX-390,
12 right?

13 A. Yes.

14 Q. Do you recall what your reaction was at the time?

15 A. I was quiet. Why wouldn't you want to get more?

16 Q. Do you recall having any understanding as to why you were
17 receiving that much more than your account balance?

18 A. The letter said it could be more or less depending on the
19 interest rate and the federal law, calculations and everything,
20 so it ended up being more.

21 Q. The last page of the letter says the minimum lump sum is
22 affected by age, interest rate and mortality table, right?

23 A. Yes.

24 Q. So was it your understanding you were receiving the minimum
25 lump sum?

F7LJOSB4

1 A. Yes.

2 THE COURT: All set?

3 MR. CLARK: Yes.

4 THE COURT: Thank you. You may step down, sir.

5 (Witness excused)

6 THE COURT: All right, ladies and gentlemen, let's
7 break for lunch. The next witness, is that going to be Ms.
8 Peck?

9 MR. GOTTESDIENER: Yes.

10 THE COURT: We'll start with Ms. Peck at 2:00 o'clock.
11 What is the current estimate for her testimony, Mr.
12 Gottesdiener, in terms of what you're going to be doing first?

13 Two hours?

14 MR. GOTTESDIENER: That would be great if we could --

15 THE COURT: You have deposed this witness. So give me
16 a sense as to what you think it is likely to be. Are we likely
17 to get her off the stand today?

18 MR. GOTTESDIENER: I think we could. Like I said
19 yesterday, I also deposed Mr. Kiley, and I couldn't have
20 predicted what happened.

21 THE COURT: I want to make sure I have a sense as to
22 what is going to be happening next. Today is Tuesday. Who is
23 coming after Ms. Peck?

24 MR. GOTTESDIENER: For plaintiffs, some of it depends
25 on what Ms. Peck says.

F7LJOSB4

1 THE COURT: I understand. Tell me right now your
2 current expectation.

3 MR. GOTTESDIENER: We have Ellen Glickfield. The
4 court has heard about her, and we have Mike Steven.

5 THE COURT: Yes.

6 MR. GOTTESDIENER: And there are two other potential
7 witnesses that are in the nature of defense witnesses.

8 THE COURT: And that is who?

9 MR. GOTTESDIENER: Ms. Derham and Ms. Rattner.

10 THE COURT: They are? Just remind me, are they on
11 your pretrial order? Are they listed?

12 MR. GOTTESDIENER: Yes.

13 MR. RUMELD: Just to clarify, Ms. Derham is listed as
14 plaintiff's witness and a defense witness. Mr. Gottesdiener
15 agreed to produce her, so we didn't subpoena her separately
16 because we have no control over Ms. Derham.

17 THE COURT: All right.

18 MR. RUMELD: Ms. Rattner is listed on
19 Mr. Gottesdiener's list, not on mine, and I am waiting to hear
20 from Mr. Gottesdiener.

21 MR. GOTTESDIENER: There was one other class member I
22 forgot I was reminded of, Ms. Hartman. So we have three class
23 member witnesses, all of whom I don't think are going to take
24 very long.

25 THE COURT: All right.

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1 MR. GOTTESDIENER: Those two other witnesses, I don't
2 know that --

3 THE COURT: That sounds like -- what I am trying to do
4 is get a sense of when we're going to get to Mr. Sher, and that
5 is going to be the longest single witness left after Ms. Peck.

6 Is that fair?

7 MR. GOTTESDIENER: The longest single witness, yes, I
8 think that is right. I just want to make clear, we have
9 multiple objections to his reports.

10 THE COURT: Anything that you folks have filed, I
11 have. If you filed multiple objections to his report, I won't
12 think about it right now because I have another matter right
13 now. We will deal with that, I told you, in due course. I
14 want to remind everybody we will end the end of the day Monday.
15 You folks, if you respectively run out of time, give me a
16 heads-up so I can cut somebody off.

17 MR. RUMELD: Is the understanding still, your Honor,
18 25 hours a side?

19 THE COURT: It is, but we need to end by the end of
20 the day Monday. It depends. If we have to end by the end of
21 the day Monday and still have time, we have to adjourn and come
22 back. That is not preferable. I have another Bench trial
23 starting Tuesday.

24 MR. RUMELD: I want to know whether your Honor is
25 going to limit Mr. Gottesdiener.

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1 THE COURT: This is why I am trying to give you guys a
2 heads-up. If we are not going to end the end of day Monday, I
3 want you to let me know because I made them truncate things
4 like I didn't feel like we need to go through any further. I
5 want to have that opportunity to do that so we can get over the
6 finish line on Monday, but I need to get a heads-up from you
7 folks. We'll come back at 2:00 o'clock. You need to clear off
8 things and push them all away.

9 (Luncheon recess)

10 (Continued on next page)

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Peck - cross

A F T E R N O O N S E S S I O N

(2:08 p.m.)

THE COURT: Mr. Gottesdiener, would you like to call your next witness, please.

MR. GOTTESDIENER: Yes, your Honor, Ms. Peck.

PATRICIA A. PECK,

called as a witness by the Defendants,

having been duly sworn, testified as follows:

THE COURT: Ms. Peck, please be seated. It's going to be very important for you to pull that chair forward so that you can speak clearly and directly into the mic.

Are these things things that can be removed?

MR. RUMELD: I will do so, your Honor. I'm sorry we didn't have a chance before the break.

THE COURT: That is OK because I had another matter in the room, so we weren't able to get to the witness stand.

We will clean things up there for you Ms. Peck.

THE WITNESS: Thank you.

THE COURT: Being placed in front of the witness is a binder which, if you open the cover of that binder, Ms. Peck, it should contain a declaration. The first thing I want you to do is confirm for me that the declaration is, in fact, your declaration that you intend to be your trial testimony in this matter, your direct testimony in this matter.

THE WITNESS: Yes. This is mine.

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Peck - cross

1 THE COURT: Do you swear to the truth of the contents
2 of that declaration?

3 THE WITNESS: I do.

4 THE COURT: All right. Thank you. The Court does
5 accept the declaration of Ms. Peck as her direct trial
6 testimony, and the witness is turned over for
7 cross-examination.

8 Mr. Gottesdiener, you may proceed, sir.

9 CROSS EXAMINATION

10 BY MR. GOTTESDIENER:

11 Q. Good afternoon, Ms. Peck.

12 A. Good afternoon.

13 Q. If we could spend a couple of minutes on some background.

14 First, you were vice president of human resources from
15 1992 at Woolworth then it changed to Venator and Foot Locker
16 until recently?

17 A. Correct.

18 Q. In that capacity you were head of the entire human
19 resources department?

20 A. Yes.

21 Q. And you were an officer -- you stopped working recently?

22 A. Yes, in February.

23 Q. February of this year?

24 A. Yes.

25 Q. You were an officer until February of this year at the same

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Peck - cross

1 level as the general counsel, is that correct?

2 A. Yes.

3 Q. You --

4 A. No. That's not true. The general counsel is a senior vice
5 president, and I was a vice president. But we were officers.

6 Q. You were both officers?

7 A. Yes.

8 Q. It may not be of any consequence. If you just indulge me.

9 Was there some point in time where you were at the
10 same level as the general counsel?

11 A. No.

12 Q. Back in the time frame 1995, 1996, the general counsel was
13 Mr. Bahler?

14 A. Right.

15 Q. You both reported to the same individual, is that correct?

16 A. Correct. I don't remember if Gary was a senior vice
17 president at that time.

18 Q. If he weren't, then you would have been on the same level
19 with Gary?

20 A. Right.

21 Q. In your deposition, let me just read this and tell me if
22 this refreshes your recollection, the bottom of 286, line 25:

23 "Q. And you and Gary Bahler were in terms of your --

24 "A. Colleagues.

25 "Q. -- in terms of your status, were you both at the top of

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Peck - cross

1 your departments?

2 "A. That's correct.

3 "Q. Was he an officer at that time?

4 "A. I believe he was, yes.

5 "Q. And you were an officer?

6 "A. I was.

7 "Q. And you were effectively at the same hierarchical level?

8 "A. Yes."

9 Does that refresh your recollection that you and he
10 were at the same level at least at that time?

11 A. OK. Yes.

12 Q. It's not necessarily a big point. I just wanted to clarify
13 that.

14 You both reported you just confirmed to the same
15 person, and that was Barry Thomson?

16 A. Yes.

17 Q. And Mr. Thomson was chief administrative officer?

18 A. Yes.

19 Q. He was very senior in the company?

20 A. Yes.

21 Q. He was part of the exclusive chairman's group?

22 A. Yes.

23 Q. Now, in addition to your role as head of HR, you served on
24 the retirement administrative committee, correct?

25 A. I don't think I was a member of the committee, but I was

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Peck - cross

1 present at their meetings.

2 Q. Did you serve the role of -- when you say you were present
3 at their meetings, what do you mean by that?

4 A. If there was a retirement administrative committee, or RAC,
5 meeting, I was there.

6 THE COURT: Were you a voting member of the committee?

7 THE WITNESS: No.

8 THE COURT: All right.

9 BY MR. GOTTESDIENER:

10 Q. Let me see if looking at docket 66 might help you explain
11 for us what your role was.

12 This is a document that is an admission by the
13 defendants as to certain facts, and what we're looking at is --

14 MR. GOTTESDIENER: Randall do you have opening slide 4
15 and 5 by any chance?

16 Q. What he's getting to is the retirement administrative
17 committee. While he's locating this, you understood it was the
18 formal administrator of the retirement plan?

19 A. Yes.

20 Q. So what he's located here is this document in this form.

21 MR. GOTTESDIENER: Then if we have the second -- yes,
22 so we can blow that up.

23 Q. This is an admission by the defendants, or a stipulation.
24 It is an agreement by the parties in the case as to certain
25 facts. What they state is plan administration, the membership

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Peck - cross

1 of this committee between 1995 and 2005, and it states that the
2 RAC members were Mr. Farah, Mr. Cannon, Dale Hilpert,
3 Mr. Hines, and you and Barry Thompson.

4 A. Yes.

5 Q. So when you say yes, I really want your testimony, not just
6 your agreement.

7 Does this refresh your recollection or help you tell
8 us that you actually were a member -- I mean, they are stating
9 that there. Is that what you believe to be the case?

10 A. Where did this come from?

11 Q. From --

12 THE COURT: Hold on just one second. I just want to
13 make sure the witness understands that the piece at the top
14 that blue piece --

15 THE WITNESS: Yes.

16 THE COURT: -- that is argument from lawyers.
17 it may be a true fact or not, but that's put on the
18 page.

19 THE WITNESS: OK.

20 THE COURT: What they've done below that is they are
21 excerpting a statement. OK?

22 THE WITNESS: OK.

23 THE COURT: So it's from what's called -- I think it's
24 called a joint stipulation.

25 Is that what it is called?

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Peck - cross

1 MR. GOTTESDIENER: Yes, your Honor.

2 If you could show 11A. It may help to see that it is
3 a statement made as to several years.

4 BY MR. GOTTESDIENER:

5 Q. So this is the actual document that is up on the screen?

6 A. Yes.

7 Q. You see it says 11A the membership from '95 to 2000.

8 What it shows is that in '95 you are on the committee,
9 and then for reasons that we are not sure of, it says, in other
10 years it says Farah, Gillespie, Hilpert, and Hines. But
11 Thomson and you are not on the committee at that point in time.

12 Do you see that?

13 A. Yes.

14 Q. Can you help us with that. I don't think you and I spoke
15 about this in your deposition in detail.

16 A. Right. Well, John Gillespie came in as the senior vice
17 president of HR, and once he came in then that's who I reported
18 to, no longer reporting to Barry Thompson.

19 Q. OK.

20 A. OK.

21 Q. But you continued to attend the meetings of the RAC?

22 A. I do believe I did, yes.

23 Q. You know obviously something about what this case is about,
24 the change to the retirement plan and how it was or not -- how
25 it was or was not communicated to people.

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Peck - cross

1 A. Uh-huh.

2 Q. You were the head of the team that was responsible for
3 coming up with a recommendation about a plan change, and then
4 responsible for the way it was communicated to participants, is
5 that correct?

6 A. Yes.

7 Q. So, because this is kind of important, we are going to walk
8 through that together, and you'll have an opportunity to
9 explain what your responsibilities were in practice and why you
10 did what you did.

11 MR. GOTTESDIENER: So if we could get on the screen
12 Ms. Peck's declaration.

13 Q. Ms. Peck, you can turn to that.

14 THE COURT: You don't go to the declaration until she
15 has an inconsistent statement. Otherwise it's just hearsay.

16 MR. GOTTESDIENER: It is her declaration.

17 THE COURT: Declaration, not the deposition. Sorry.

18 BY MR. GOTTESDIENER:

19 Q. Your declaration, your direct testimony, paragraph 3?

20 A. Uh-huh.

21 Q. So, starting at the beginning when this project started,
22 you discussed this in your declaration. First, to cap it all
23 off, you would agree that the goal of the change was to cut
24 costs?

25 A. One of the goals.

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Peck - cross

1 Q. Well, let's look at what you say here in your declaration.

2 You say: In late 1994, or early 1995, Foot Locker's
3 management announced that, in light of the company's poor
4 financial condition it was necessary for the company to cut
5 costs, including with respect to retirement benefits. Members
6 of senior management instructed me to provide them with a
7 suitable recommendation.

8 That is true, right?

9 A. That is true.

10 Q. By senior management, you mean all the way to the top,
11 including CEO, Roger Farah?

12 A. Yes.

13 Q. Are you aware, while I'm locating a document, that
14 Mr. Farah has testified in this case?

15 A. Yes.

16 Q. PX 24 --

17 MR. GOTTESDIENER: May I approach the witness, your
18 Honor?

19 THE COURT: Yes.

20 MR. GOTTESDIENER: Does your Honor need a copy of
21 this?

22 THE COURT: No.

23 BY MR. GOTTESDIENER:

24 Q. Here's a copy for you. You can look on the monitor, you
25 can look at the hard copy, you can look on that. You have all

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Peck - cross

1 those choices.

2 A. OK. Thank you.

3 Q. This is a deck that bears your name. Do you see that
4 401(k) Plan Review on the front cover first? It is after that
5 cover page. Do you see there June 10, 1997?

6 A. Just a minute, please.

7 Q. Sure. Take your time.

8 A. No.

9 Q. I'm sorry?

10 A. No. I don't have it. Where is it?

11 Q. What is confusing is this cover page just shows that it was
12 filed in court.

13 A. OK.

14 Q. On the back, because we tried not to kill too many trees,
15 we have it double sided?

16 A. I got it, OK.

17 Q. Do you see that this is your deck from June of '97?

18 A. I see that.

19 Q. 401(k) Plan Review is the title?

20 A. Yes.

21 Q. Thumbing through it, can you see that this is a
22 presentation that you made to senior management?

23 A. Yes.

24 Q. That would have included Mr. Farah?

25 A. It should have, yes.

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Peck - cross

1 Q. You see on the page that says, Background?

2 A. Yes.

3 Q. It states, In February 1995 Roger N. Farah directed that a
4 review of the company's retirement program be undertaken.

5 A. Yes.

6 Q. And then there is a bullet point, and it says, A task force
7 consisting of four corporate benefits department associates was
8 established.

9 A. Yes.

10 Q. The task force consisted of Tom Kiley, Carol Kanowicz,
11 Marion Derham -- and the fourth person?

12 A. Would have been me.

13 Q. Do you see underneath here you state that in May the
14 concept of converting the company's defined benefit pension
15 plan was presented -- I'm skipping some words -- was presented
16 to the CFO, CIO, general counsel, and secretary-treasurer, vice
17 president of taxation, and controller?

18 A. Yes.

19 Q. You have no reason to doubt that the statements that you
20 made in this deck are true?

21 A. Right, yes.

22 Q. Right. It's sometimes confusing, the negative. I am just
23 saying you have no reason to think that any of those statements
24 are inaccurate.

25 Thank you.

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Peck - cross

1 So in your declaration, going back to paragraph 3 of
2 your statement to her Honor as your direct testimony, you say
3 they instructed me.

4 So it's fair to say that this was your responsibility?

5 A. They instructed me as the head of department.

6 Q. Members of senior management instructed me to provide them
7 with a suitable recommendation?

8 A. Yes. That's right.

9 Q. So it was your responsibility as you understood it?

10 A. Yes.

11 Q. And you were in charge of the project, assembled the team
12 we just mentioned, and you were reporting to Thomson, who you
13 understood would then take matters up the line to Mr. Farah and
14 ultimately the board?

15 A. Yes.

16 Q. You were the one who made the decisions about what went up
17 the line?

18 A. With the committee, yes.

19 Q. With which committee?

20 A. The group that we were working -- that was working.

21 Q. The task force?

22 A. Right. Uh-huh.

23 Q. OK. But you were ultimately the one who decided?

24 A. Yes.

25 Q. And is it fair that you were to take and did take all of

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Peck - cross

1 the task force, the core team members' work and perhaps relying
2 on their judgment, winnow down the options for presentation to
3 Thomson?

4 A. Yes.

5 Q. You understood at the time when you were going through this
6 process that the company needed to save a lot of money?

7 A. The company needed to save money, yes.

8 Q. The edict came from Mr. Farah and Mr. Hilpert to see what
9 could be done without unduly upsetting employees to cut
10 benefits?

11 MR. RUMELD: Objection.

12 THE COURT: Hold on.

13 Sustained.

14 BY MR. GOTTESDIENER:

15 Q. I asked you about you needed, you understood there was the
16 need to cut -- withdrawn. The edicts came to cut expenses from
17 Roger and Dale, correct?

18 A. Yes. But I actually got it from Barry as my supervisor.

19 Q. Barry was person who informed you that Roger and Dale had
20 directed him to have you cut what you could and come up with a
21 recommendation?

22 A. That's correct.

23 Q. You understood this was a big item for top management?

24 A. Yes.

25 Q. It was a big item because it had to do with benefits that

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Peck - cross

1 affected everyone?

2 A. Yes.

3 Q. Because of that, you understood that's why they would all
4 be involved in it?

5 A. I don't think those two things necessarily go together.

6 Q. Again, it may not be that big of a point, but I want to ask
7 you, in speaking with me in your deposition, page 155, line 18,
8 I asked you:

9 "Q. So why the three of them at this time?

10 A. Right. Because -- because -- well, certainly Barry as my
11 boss. And then, you know, the -- the edict to cut expenses
12 came from Roger and Dale so -- and this is a big item having to
13 do with benefits that affects everyone.

14 "So that's why they -- and it ultimately has to go to
15 the -- to the board, so that's why they would all be involved
16 in it."

17 So now --

18 A. And that's the statement, yes.

19 Q. You gave that testimony, right?

20 A. Right.

21 Q. So you see that you were drawing that connection between
22 those?

23 A. Right.

24 Q. Right?

25 A. Yes.

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Peck - cross

1 Q. Thank you. So the first step was, after the task force was
2 assembled, you saw the job to work collaboratively with Mercer?

3 A. Yes.

4 Q. And Mercer was the company's longtime actuarial firm?

5 A. Correct.

6 Q. To come up with a proposal that would work for the company?

7 A. Right.

8 Q. This was not to be some kind of prepackaged off-the-shelf
9 Mercer design; it was something that was right for the company
10 in the situation?

11 A. Right.

12 Q. Looking again at paragraph 3 of your declaration: Because
13 I -- meaning you -- did not have any specialized training in
14 employee benefits or finance, I asked Thomas Kiley, who was
15 then serving as manager of benefits planning and design, to
16 work with the corporate benefits department and Mercer, the
17 actuary, in providing me with the recommendation for
18 management.

19 A. Yes.

20 Q. That's accurate, right?

21 A. Yes.

22 Q. So you turned to Kiley because he has the necessary pension
23 expertise?

24 A. Right.

25 Q. He's somebody who understood the ins and outs of pension

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Peck - cross

1 plans?

2 A. Yes.

3 Q. You wanted to know what you would be getting into? You
4 were not content to just say, Here, Mercer, do this and Mercer
5 would say, trust us, this is what you should do.

6 Correct?

7 A. Correct.

8 Q. And Tom you would agree was very bright, knew his pension
9 field very well, would communicate with an actuary succinctly,
10 and understood what the actuaries would be presenting to him?

11 MR. RUMELD: Objection.

12 THE COURT: Let me just read this. Hold on.

13 Sustained.

14 BY MR. GOTTESDIENER:

15 Q. Tom was very bright, correct?

16 A. Yes.

17 Q. Tom knew his pension field very well, right?

18 A. Yes.

19 Q. Tom could communicate with an actuary succinctly?

20 A. Yes.

21 Q. And Tom understood, as far as you knew, what the actuaries
22 would be presenting to him?

23 A. Yes.

24 MR. RUMELD: Objection.

25 THE COURT: Overruled.

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Peck - cross

1 Q. You can answer.

2 A. Yes.

3 Q. So, again, looking at paragraph 3 of your declaration, you
4 say in the next sentence there, After lengthy internal
5 deliberations, and based on advice received from James Grefig
6 of Mercer, Kiley recommended that the plan be converted from a
7 traditional career average pay defined benefit plan to a cash
8 balance plan, and that this change occur simultaneously with
9 the institution of a 401(k) plan with corporate matching
10 contributions.

11 Is that correct?

12 A. Yes.

13 Q. So I take it from what we just talked about with Barry and
14 top management you mean that Kiley recommends to you, you
15 satisfy yourself the recommendation makes sense, and then you
16 run it up the line in a big picture way, and it then moves
17 forward from there?

18 A. I run it up the line, yes.

19 Q. You would agree that because there were lengthy internal
20 deliberations, there was nothing preordained in January or
21 February about what kind of changes to the plan you were going
22 to have?

23 MR. RUMELD: Objection.

24 THE COURT: Overruled.

25 A. Would you repeat that question, please.

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Peck - cross

1 Q. Sure. I think it's very understandable. You say that
2 after lengthy internal deliberations --

3 A. Right.

4 Q. -- Kiley came up with this recommendation. I'm just asking
5 you, prior to the lengthy internal deliberations, there was
6 nothing preordained in terms of what the plan was going to look
7 like after it changed if the recommendation were followed?

8 A. That's right. There was nothing preordained.

9 Q. In fact, as late as May of '95 -- I am reminding you about
10 that deck that you have in front of you from '97 that talks
11 about on page 3, that hard copy you have in front of you, if
12 you want to refresh your recollection?

13 A. Right.

14 Q. You mentioned as a second step in the deck on page 3 that
15 there was a presentation to senior management in May of '95.

16 Do you want to just take a look at that again.

17 Page 3.

18 A. I have it. OK.

19 Q. Right. I want to ask you that in fact as late as May that
20 the point in time there was nothing preordained? I'll ask it
21 another way.

22 It would be fair to say that it was still, in May you
23 were still in a fact finding mode at that point in time?

24 MR. RUMELD: Objection.

25 THE COURT: Sustained.

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Peck - cross

1 Why don't you rephrase that.

2 MR. GOTTESDIENER: Poorly asked.

3 BY MR. GOTTESDIENER:

4 Q. Prior to May there still was nothing preordained in terms
5 of the recommendation that you were going to make to senior
6 management?

7 MR. RUMELD: Objection.

8 THE COURT: Overruled.

9 A. That's right.

10 THE COURT: Does that mean the same thing as you
11 hadn't yet decided what to recommend?

12 THE WITNESS: Yes.

13 THE COURT: Thank you.

14 THE WITNESS: Thank you.

15 Q. Sorry for all the lawyerisms. How about let's look at
16 February 2, 1995. You say in your declaration paragraph 6 that
17 in early '95 you participated in at least one meeting during
18 which possible changes were being discussed.

19 Do you see that there in paragraph 6?

20 A. I do.

21 Q. Do you have that binder in front of you that was put in
22 front of you?

23 A. Yes.

24 Q. Let me give you our copy. You can also look at the binder.

25 MR. GOTTESDIENER: May I approach, your Honor?

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Peck - cross

1 THE COURT: You may.

2 BY MR. GOTTESDIENER:

3 Q. This is PX 84. PX is plaintiff, DX is defendant. Many
4 documents are exhibits of both sides. This is one of them. PX
5 84 you would agree are your handwritten notes?

6 A. I agree.

7 Q. And you have looked at these notes probably more than you
8 would have liked to on many occasions prior to today in the
9 past few years, is that right?

10 A. Yes.

11 Q. This is a meeting at which, according to your declaration,
12 you came to learn that there was an aspect of the proposed
13 design that would have the effect of suspending the accrual of
14 new benefits for employees for a period of time, is that
15 correct?

16 A. Yes.

17 Q. If you look at page 2, you can see at the top of the page
18 where you write, example 7.83 percent and 9 percent?

19 A. Yes.

20 Q. You drew a bar graph, right?

21 A. Yes.

22 Q. And you were there illustrating the wear-away effect in
23 that circumstance, if there was a conversion using 9 percent as
24 a discount rate applied to the 12/31 benefit, but somebody
25 cashed out at 7.83 percent, a GATT rate?

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Peck - cross

1 A. Yes.

2 Q. In this meeting by the way, there were Mercer people, there
3 was Tom Kiley. Who is it that was giving this example? Can
4 you be sure?

5 A. I believe it was Jim Grefig. This was part of what he was
6 telling us about, yes.

7 Q. Certainly Jim Grefig you would agree did talk to you about
8 wear-away. You have that recollection, right?

9 A. We never referred to it as wear-away at that point no.

10 Q. At some point you did?

11 A. Much, much later.

12 Q. And when you say much, much later, you mean a year or so
13 into the implementation of the new plan?

14 A. I don't exactly remember when, but it was certainly not at
15 this time we weren't calling it wear-away.

16 Q. But I'm just trying to get a range. Some period of time
17 within a year or two of the implementation of the plan, in that
18 general time frame?

19 A. I don't -- yes, I guess so.

20 Q. OK.

21 A. I don't recall exactly when, but that seems reasonable.

22 Q. It was around the time when you -- I don't want to get too
23 far ahead of things, but it was around the time when you
24 understood that this effect, this suspension of new accruals,
25 was lasting longer than you would -- or previously was going to

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Peck - cross

1 last, is that fair?

2 MR. RUMELD: Objection.

3 THE COURT: Yes. Hold on.

4 All right. Sustained.

5 The question is unclear.

6 BY MR. GOTTESDIENER:

7 Q. All I'm trying to do is get a sense from you what was the
8 circumstance under which you started hearing it and you started
9 referring to it as wear-away?

10 A. I don't remember the exact circumstance.

11 Q. Just to finish, the general circumstance was that it was
12 something that you understood was impacting a significant
13 number of people?

14 A. Yes.

15 Q. So this was during the time it was still going on, after
16 the conversion, correct?

17 A. After.

18 Q. The impact?

19 A. After what?

20 Q. The conversion, the amendment.

21 A. After the amendment.

22 THE COURT: Let's take the question I think a lit bit
23 differently.

24 I Think what Mr. Gottesdiener is trying to get at is,
25 when you first started using the phrase wear-away in connection

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Peck - cross

1 with the suspension of accruals, was it before the amendment
2 went into effect or after?

3 THE WITNESS: I believe it was after.

4 THE COURT: Do you recall whether it was relatively
5 soon after the amendment went into effect, or can you estimate
6 the period of time when you started using that phrase?

7 THE WITNESS: Yeah. It wasn't relatively soon.

8 THE COURT: It was not relatively soon?

9 THE WITNESS: It was not relatively soon.

10 THE COURT: Do you have any estimate at all? Would it
11 have been within two years or three years? Or some other
12 period of time?

13 If you don't recall, you don't recall.

14 THE WITNESS: I don't recall.

15 THE COURT: Do you recall the circumstances under
16 which you started using that phrase?

17 THE WITNESS: No, definitely not.

18 THE COURT: All right. Mr. Gottesdiener, you may
19 proceed.

20 MR. GOTTESDIENER: Thank you, your Honor.

21 BY MR. GOTTESDIENER:

22 Q. You'll let us know. In the course of seeing some more
23 documents, maybe it will come back to you, and I will ask you
24 again the same question.

25 However, one thing that you do know is that you --

F7lnosb5

Peck - cross

1 first of all, can we agree even though it wasn't called
2 wear-away at the time it still is wear-away, so is it OK if we
3 refer to it as wear-away?

4 A. That's fine. But, as you said, it was not part of our
5 vocabulary.

6 Q. On February 2, 1995, right?

7 A. Right.

8 Q. So one thing we were not exactly finished with, you said
9 Grefig the reason we went down that road, Grefig you think was
10 talking with you all at this meeting?

11 A. Yes, he did.

12 Q. And explaining wear-away?

13 A. Without labeling it that, yes.

14 Q. That's the graph that you're drawing; that illustrates
15 wear-away, right?

16 A. Yes.

17 THE COURT: Which graph is this?

18 MR. GOTTESDIENER: This is on page 2 of PX 84.

19 THE COURT: All right.

20 MR. GOTTESDIENER: This is the example that we went
21 through with Mr. Kiley.

22 THE COURT: All right.

23 MR. GOTTESDIENER: I won't take the Court's time to go
24 through the example now.

25 THE COURT: I just want to have the record clean.

F7lnosb5

Peck - cross

1 MR. GOTTESDIENER: Maybe I should now that it's popped
2 up here. I think the Court has it.

3 THE COURT: Really just for the record I wanted to
4 make sure we had it on page 2.

5 MR. GOTTESDIENER: Thank you.

6 I am just mindful of the time.

7 THE COURT: OK.

8 BY MR. GOTTESDIENER:

9 Q. In your deposition -- memory can play tricks, so just let
10 us know if this helps. I think in your deposition you thought
11 that maybe it was Mark Brandes or Tom Kiley or maybe both of
12 them who were giving you that example of wear-away. Do you
13 remember saying that?

14 A. I don't remember saying it. But what I was saying was that
15 I didn't remember which of them actually made that example.

16 Q. OK. Now I'm asking because in your deposition -- and I
17 could read it to you, direct you to page 203 of it, to show it
18 to you.

19 On page 203, 204 when you were talking about this
20 discussion, you didn't mention Grefig, so I'm just wondering
21 are you now remembering that it was Jim?

22 A. Well, he was the actuary. So it's quite possible that it
23 was him, right.

24 Q. But it is also possible that, as you said in your
25 deposition, that it, maybe it was Kiley or Mark Brandes from

F7lnosb5

Peck - cross

1 Mercer?

2 A. Right. It could have been Mark, uh-huh.

3 Q. You also said it could have been Kiley?

4 A. Could have been, sure.

5 Q. So you understood from this presentation and your
6 discussions that -- you understood wear-away at that time,
7 right?

8 A. We were not referring to it as wear-away.

9 Q. Right. I'm asking, don't you agree that the phenomenon is
10 the phenomenon, and can we just have an agreement that I hear
11 what you are saying?

12 A. Yes.

13 Q. And I accept what you are saying. But can we refer to as
14 wear-away?

15 Because it is that phenomenon, even if you didn't call
16 it that on February 2. Do you agree?

17 A. OK.

18 Q. OK. So you had a good grasp of wear-away after these
19 discussions, is that fair?

20 MR. RUMELD: Objection.

21 A. I --

22 THE COURT: Overruled.

23 Q. I'm sorry. Your answer?

24 THE COURT: You may answer.

25 A. I don't -- I would not call it a good grasp, no, I

F7lnosb5

Peck - cross

1 wouldn't.

2 Q. OK.

3 A. Not after one meeting.

4 Q. Well, how about this. Soon thereafter -- that's why I kind
5 of asked the question, your discussions with the task force
6 this meeting and discussions that may have followed, you came
7 not long thereafter to have a good grasp of wear-away?

8 A. Right.

9 Q. And you came to understand that the wear-away -- first of
10 all, it was something that was an option. It was not something
11 that was necessary to using a cash balance formula?

12 MR. RUMELD: Objection.

13 THE COURT: Overruled.

14 A. Would you ask the question again, please.

15 Q. Sure. Maybe I can use your notes to help. If you look at
16 your notes on page 2 at the bottom?

17 A. Uh-huh.

18 THE COURT: PX 84.

19 Q. Do you see where it says --

20 MR. GOTTESDIENER: The prior page, Randall. 7347 is
21 the Bates number.

22 Q. Towards the very bottom, do you see where it says, Convert
23 current approved benefit.

24 Do you see those words?

25 A. Yes.

F7lnosb5

Peck - cross

1 Q. And then it kind of cuts off at the end of that sentence.
2 Then it says, May convert at 9 percent. But if they term. we
3 must value at 7.83 percent.

4 Do you see that?

5 A. I see it.

6 Q. You understood that you may convert at 9 percent; you may
7 convert at some other interest rate?

8 A. OK.

9 Q. You understood that?

10 A. Yes.

11 Q. And you understood that there could be cash balance plans
12 that didn't have wear-away, right? They could convert it at
13 7.83, for example?

14 A. Right.

15 MR. GOTTESDIENER: OK.

16 THE COURT: Hold on.

17 I just want to make sure she is not just agreeing with
18 what you are saying, but actually agrees with the concept.

19 MR. GOTTESDIENER: Sure.

20 THE COURT: I want you to be very careful just to make
21 sure that was your understanding at the time. I'm not trying
22 to say it wasn't.

23 THE WITNESS: That's OK.

24 THE COURT: But I just want to make sure. Was it your
25 understanding at the time that the company had some discretion

F7lnosb5

Peck - cross

1 to choose what rate it wanted to discount, and that it could
2 discount at 9 percent or discount, at some other rate, and it
3 could, if it wanted, make the discount rate the same rate as
4 the GATT rate?

5 THE WITNESS: Yes, I understood that.

6 THE COURT: OK. Thank you. You may proceed,
7 Mr. Gottesdiener.

8 BY MR. GOTTESDIENER:

9 Q. You also understood that under the design that was
10 ultimately adopted, wear-away was built into the conversion?

11 MR. RUMELD: Objection.

12 THE COURT: Overruled.

13 A. Because of the difference in the interest rates, yes. I
14 understood that.

15 Q. In addition to this GATT rate, where somebody cashes out,
16 there is another interest rate or in this point an interest
17 crediting rate that was important that you understood was
18 fundamental to the wear-away, right, the 6 percent interest
19 crediting rate?

20 A. I know the 6 percent that you are talking about, but --

21 Q. You knew that if you were to take somebody's already
22 accrued benefit up to 12/31/95 and apply a 9 percent discount
23 rate to it to reduce it to what looks like a cash amount, an
24 opening account balance, but then in the cash balance formula
25 you move people forward going back to age 65 only at a

F7lnosb5

Peck - cross

1 guaranteed rate of 6 percent that it's that differential
2 between the 6 and the 9 that locks in mathematically the
3 wear-away period?

4 A. Yes. I knew that.

5 Q. You had to know what you told us just now that you knew in
6 order to do your job in this context, correct?

7 A. Yes.

8 Q. You came to know that it was wear-away that was going to be
9 causing the drop in the normal cost that was going to save the
10 company the cash it needed to save?

11 A. We didn't think about it as wear-away, but, yes, we knew.

12 Q. The anticipated normal cost savings that Mercer described
13 for you from the conversion, they were based you understood
14 directly on the fact that because of the conversion, the way it
15 was structured, a person wouldn't earn any additional benefits
16 for a period of time after the conversion?

17 MR. RUMELD: Objection.

18 THE COURT: Overruled.

19 A. Yes.

20 Q. That was, even if you didn't use the word on February 2,
21 that was the wear-away period, correct?

22 A. Uh-huh, yes.

23 Q. The period during which a person didn't earn any additional
24 benefits, correct?

25 A. Yes.

F7lnosb5

Peck - cross

1 Q. Now, you came to learn initially in the spring that this
2 wear-away period was expected to last one or two years, is that
3 correct?

4 A. I was thinking it was -- I thought I had two to three
5 years, but --

6 Q. I was going to get to that next.

7 By April you understood that it was anticipated to be
8 lasting two to three years, is that right?

9 A. Yes.

10 Q. And you also came to learn that that GATT rate, which was
11 the actual cashout rate if somebody left the plan --

12 A. Uh-huh.

13 Q. -- if that dropped further than where it was at the time
14 Mercer gave these estimated wear-away periods that that would
15 worsen or lengthen the wear-away period?

16 A. I knew that it would worsen it, yes.

17 (Continued on next page)

F7LJOSB6

Peck - cross

1 Q. And you understood that during that period of time
2 someone's account balance going up really would not have meant
3 anything to them if they were still in the wear-away. Is that
4 correct?

5 A. That's correct.

6 Q. So during that period of time, that growth to the account
7 doesn't end up meaning anything because it doesn't actually add
8 to their pension, correct?

9 A. That's correct.

10 Q. Now, one of the options that was considered to save money
11 was a freeze of the plan itself. Do you recall that?

12 A. Yes.

13 Q. You understood that wear-away had the same effect as a
14 benefit freeze, a freeze of the plan itself, correct?

15 A. No, that is not correct.

16 Q. Well, you agree that you all were contemplating a pension
17 freeze, meaning a freeze of the entire plan?

18 MR. RUMELD: Objection.

19 MR. GOTTESDIENER: Let me ask it another way because
20 of the way that came out.

21 THE COURT: Yes.

22 BY MR. GOTTESDIENER:

23 Q. It was something that was considered as a possibility to be
24 looked at to understand what the savings would be and the
25 implications to do an open freeze of the pension money?

F7LJOSB6

Peck - cross

1 A. Yes, it was.

2 Q. And the participants, if there were such an open, total
3 freeze of the plan, the participants would not earn any new
4 benefits during that time, correct?

5 MR. RUMELD: Objection.

6 THE COURT: Overruled.

7 A. Correct.

8 BY MR. GOTTESDIENER:

9 Q. And you understood that at the time when you were at least
10 exploring understanding the implications of an actual open
11 pension freeze of the entire plan?

12 A. Correct.

13 Q. So you knew at the time that the effect of the wear-away
14 was no different as a practical matter from the employee's
15 point of view than a pension freeze, right?

16 A. No, we didn't equate the two.

17 Q. Well, I'm not exactly asking if you equated them, but you
18 recognized that there was not from the employee's point of view
19 any difference in that situation?

20 A. As we look back on it now, we realize that, but that was
21 not what we saw when we were looking at the possibility of
22 doing a pension freeze.

23 Q. Well, what you saw when you were looking at the possibility
24 of adopting a cash balance formula that had a built in
25 wear-away, the effect on people's benefits would be they would

F7LJOSB6

Peck - cross

1 not earn any new benefits for a period of time, correct?

2 A. Only for a short period of time was our understanding.

3 Q. That was your understanding, a short period of time, two to
4 three years, you're calling that a short period of time?

5 A. Yes.

6 Q. Well, so pension is part of people's total compensation,
7 right?

8 A. That's correct.

9 Q. If you turn back to that 401 (k) presentation you made to
10 Mr. Farah and other senior managers, you'll see that you note
11 in there on Page 6, still in the background, the Bates number
12 is 3954, do you see that?

13 A. Yes.

14 Q. The average salary for participants, the employees, was
15 about \$22,000. Am I right?

16 A. Ah-huh.

17 Q. So the company paid people not just salary, but salary and
18 benefits, right? The total compensation that an employee
19 earned was their salary plus their benefits, right?

20 A. Yes.

21 Q. And pension was one of the benefits at least up until this
22 amendment that was part of people's total compensation?

23 A. Yes.

24 Q. So they stopped when they're in wear-away, and you're
25 stopping any new pension benefits, your total compensation, all

F7LJOSB6

Peck - cross

1 other things being equal, is being cut?

2 A. Okay.

3 Q. You agree?

4 A. Yes, I agree with the mathematics, yes, ah-huh.

5 Q. You brought in a water bottle. Do you want to have a drink
6 of water?

7 A. It is not going to help. (Pause)

8 Q. But you have water?

9 A. I do. Thank you.

10 Q. Let us know if you need anything else.

11 What you were describing as a two to three year
12 wear-away period, I think you said that that was a short period
13 of time, you thought of that as a short period of time?

14 A. Yes.

15 Q. You later -- we'll come back to it -- you later learned
16 that it was going to be even longer than two to three years,
17 right?

18 A. Yes.

19 Q. If you were working for a company, and the company decided
20 to freeze your benefit maybe even for a short period of time,
21 would you want to know about that?

22 MR. RUMELD: Objection.

23 THE COURT: Rephrase.

24 BY MR. GOTTESDIENER:

25 Q. If you were still employed and your employer --

F7LJOSB6

Peck - cross

1 THE COURT: Rephrase it from there.

2 Q. -- would you want to know if your employer was freezing
3 your pension even for a short period of time?

4 A. I, Pat Peck, would want to know, but that doesn't mean that
5 everybody would.

6 Q. Am I understanding you to be saying that you, Pat Peck,
7 would want to know because you paid attention to those kinds of
8 things?

9 A. Yes.

10 Q. Whereas, from your understanding and experience as head of
11 HR, you didn't think that the employees at Woolworth, except
12 for those right on the cusp of retiring, paid much attention to
13 their retirement?

14 MR. RUMELD: Objection.

15 THE COURT: Sustained.

16 THE WITNESS: Well --

17 THE COURT: Hold on. Let him rephrase the question.

18 MR. GOTTESDIENER: I'm actually trying to understand
19 your last answer.

20 BY MR. GOTTESDIENER:

21 Q. What is it about you?

22 You would want to know if the company was freezing
23 your benefit, your pension benefit?

24 THE COURT: She can't see in the mind of others. You
25 have to word it differently. She can't understand why somebody

F7LJOSB6

Peck - cross

1 else would or would not find it to be the same as for her, nor
2 do you need to go any further with this. I think it is worth
3 moving on.

4 MR. GOTTESDIENER: Could I ask one more question, your
5 Honor?

6 THE COURT: You can ask and we'll see if it is all
7 right.

8 BY MR. GOTTESDIENER:

9 Q. So you would want to know if your benefit had been frozen
10 even for a short period of time, right?

11 THE COURT: She answered that.

12 MR. GOTTESDIENER: That is just a predicate?

13 THE COURT: You don't need to have a predicate.

14 Go on.

15 BY MR. GOTTESDIENER:

16 Q. Your answer would be the same, you would definitely want to
17 know about it if it were for a long period of time?

18 A. Yes, I would want to know if it was for a long period of
19 time.

20 Q. So you'd want to know even if it were a short period of
21 time, you would definitely want to know if they were freezing
22 your benefit for a long period of time?

23 A. Yes.

24 Q. Now, in the Fall of 1996 -- before I ask that question, you
25 knew that the wear-away affected everybody, adversely affected

F7LJOSB6

Peck - cross

1 everybody?

2 A. No, because of the enhancement that we gave to people that
3 were over 50 and had 15 years of service.

4 Q. Let me try it this way.

5 Without getting into all the details of that, those
6 people, all of those people still suffered a period of
7 wear-away. Would you agree?

8 A. I don't know the answer.

9 Q. In your deposition, Page 230, I asked this question and you
10 gave this answer. I asked at Line 2:

11 "Q You understand that you yourself experienced wear-away?

12 "A All of us did, yes."

13 You gave that testimony, right?

14 A. I did.

15 Q. You knew that the use of the 9 percent discount rate to
16 create opening balances, that that meant for everybody across
17 the board, that their opening balance was less than the pension
18 that they had actually earned up to 12-31-95 --

19 MR. RUMELD: Objection.

20 Q. -- correct?

21 THE COURT: Hold on.

22 THE COURT: Overruled. You you may answer.

23 A. Would you ask it again, please.

24 MR. GOTTESDIENER: Sure.

25 BY MR. GOTTESDIENER:

F7LJOSB6

Peck - cross

1 Q. You knew that you were being given an opening balance that
2 was significantly less than the pension that you had actually
3 earned up to 12-31-95, correct?

4 A. Yes.

5 Q. And you knew that basically that was true across the board
6 for everybody in the company?

7 A. I am not so sure it was everybody now.

8 Q. Basically everybody?

9 A. Basically.

10 Q. Basically, yes?

11 MR. RUMELD: Objection, your Honor.

12 THE COURT: Hold on. I am trying to get the witness's
13 answer. Did you agree it was basically everybody?

14 THE WITNESS: Well, not everybody.

15 THE COURT: But not everybody?

16 THE WITNESS: But not everybody.

17 THE COURT: All right.

18 BY MR. GOTTESDIENER:

19 Q. But basically everybody?

20 THE COURT: I think we have her testimony. You can go
21 on.

22 MR. GOTTESDIENER: I agree, your Honor.

23 BY MR. GOTTESDIENER:

24 Q. Just so the record is clear, you knew that the other
25 members of the task force had at least as good an understanding

F7LJOSB6

Peck - cross

1 of the wear-away as you do? Probably better is what you were
2 about to say?

3 A. Yeah, probably better.

4 Q. Certainly Tom and Carol?

5 A. Right.

6 Q. Is that fair?

7 A. Ah-huh.

8 Q. You have to say yes or no for the court reporter.

9 A. I am sorry. Yes.

10 Q. Mary, she was lower down, she was underneath Carol, right?

11 A. Correct.

12 Q. Now, in September of '96 you came to learn that the
13 wear-away period was anticipated to last a lot longer than you
14 had previously learned. Is that fair?

15 MR. RUMELD: Objection.

16 THE COURT: Overruled.

17 A. I believe it was four to five years.

18 BY MR. GOTTESDIENER:

19 Q. You came to learn that in September of 1996. Is that
20 right? That is what you're saying?

21 A. Yes.

22 Q. And the way you learned that was through a letter that
23 Mercer sent to the company, explaining that the wear-away was
24 now slated to last three to four years presumably from the date
25 of the letter in September, so now a total of four to five

F7LJOSB6

Peck - cross

1 years. Is that fair?

2 A. That's fair.

3 Q. In that letter that explained -- why don't we just get that
4 up on the board, PX-9, this is the Mercer letter you were
5 referring to. Is that right?

6 A. Yes.

7 Q. You have seen that recently several times?

8 A. Yes.

9 Q. In that letter you'll recall that they were reporting that
10 the normal cost for the pension plan was going to stay at \$4
11 million, eventually when the wear-away ended increasing up to
12 \$10 million. Is that right?

13 A. Yes.

14 Q. You needed to know how long this period was lasting so you
15 could inform senior management from a fully informed
16 perspective as to what your recommendation for a design was
17 going to be?

18 A. Yes.

19 Q. You wouldn't have recommended a design that you didn't
20 fully understand. Is that fair?

21 A. That's fair, yes.

22 Q. If I understand your testimony, you actually did inform
23 senior management, through Barry Thomson at least, of the
24 wear-away that was built into the plan design?

25 A. Yes, we told Barry, ah-huh.

F7LJOSB6

Peck - cross

1 Q. When you say you told Barry, you may recall from the
2 deposition this wasn't some casual mention that you think he
3 could have missed, this was something that you made sure that
4 he understood. Is that fair?

5 A. Yes.

6 Q. And you considered Barry to be very, very bright?

7 A. Very bright, yes.

8 Q. You affirmatively told him that everybody was going to be
9 impacted by a benefit no growth stall for a period of years,
10 right? You may have used different words, but you got that
11 concept across to him?

12 A. The concept, yes.

13 MR. RUMELD: Objection.

14 THE COURT: Overruled.

15 BY MR. GOTTESDIENER:

16 Q. You didn't get a blank stare when you told him that? In
17 your opinion, from what you observed, he got it? He understood
18 it?

19 A. Yes, I think he understood it.

20 THE COURT: Do you remember whether you conveyed this
21 information to Mr. Thomson at a meeting or in some other form?

22 THE WITNESS: It would have been at a meeting.

23 THE COURT: Do you know approximately how long you
24 spent with him on this topic?

25 THE WITNESS: No, I don't recall. I am sorry.

F7LJOSB6

Peck - cross

1 THE COURT: When you say that it was your perception
2 that he understood the concept that we have been referring to
3 as wear-away, what's that based on?

4 THE WITNESS: It's based on if he didn't understand
5 it, he would have kept asking me, asking me more and more
6 questions.

7 THE COURT: Was it your experience with Mr. Thomson
8 that if he didn't understand something, he would probe further
9 for additional information from you?

10 THE WITNESS: Yes.

11 THE COURT: All right. Thank you. May proceed, Mr.
12 Gottesdiener.

13 BY MR. GOTTESDIENER:

14 Q. Moving forward to May of '95, back into the actual design
15 process, there was a meeting on May 1st with top management,
16 and if I could approach, your Honor, to give Ms. Peck what is
17 PX-10. This was an exhibit in your deposition we talked about.

18 MR. GOTTESDIENER: Your Honor I think has a copy of
19 that already.

20 THE COURT: Yes.

21 BY MR. GOTTESDIENER:

22 Q. This is a May 1st dec, and if you care to refer to the '97
23 dec that has been a useful source of confirmatory information,
24 this was where you said the concept of converting and using
25 this formula with the wear-away was presented to the CFO, the

F7LJOSB6

Peck - cross

1 CIO. Do you remember that at the bottom of Page 4 of the '97
2 dec?

3 MR. RUMELD: Objection.

4 THE COURT: Hold on.

5 MR. GOTTESDIENER: I can rephrase it.

6 THE COURT: Please.

7 MR. GOTTESDIENER: I am trying to help the witness see
8 the timeline here.

9 BY MR. GOTTESDIENER:

10 Q. In the '97 dec you mentioned in May 95 there was a formal
11 presentation to upper management. You agree that is what that
12 is referencing?

13 A. Ah-huh.

14 Q. I am just helping you see what I put in front of you is a
15 May 1, '95 presentation. You have no reason to think that it's
16 not one and the same presentation, correct?

17 A. Right.

18 Q. And you see that the version that I put in front of you has
19 your handwriting on it?

20 A. Yes.

21 Q. Let me also show you a copy that's PX-632 that has
22 Mr. Kiley's handwriting on it.

23 MR. GOTTESDIENER: May I approach?

24 THE COURT: Yes.

25 MR. GOTTESDIENER: Your Honor, if you want an extra

F7LJOSB6

Peck - cross

1 copy, there's one.

2 BY MR. GOTTESDIENER:

3 Q. Could you just confirm that is Mr. Kiley's handwriting that
4 you recognize?

5 A. Yes, it is.

6 Q. And you're looking at the first page that has the single
7 objective to decrease long term company cost, to promote the
8 sharing of responsibility for retirement savings with
9 associates. He wrote above that, do you see that?

10 A. Yes.

11 Q. What he wrote you can read is in January we were charged
12 with the responsibility to decrease ongoing company cost. Do
13 you see that there?

14 A. I do.

15 Q. And that's accurate, right, both the objective and what he
16 wrote in his handwriting, correct?

17 A. Yes.

18 Q. There is nothing on this page and nothing in what Mr. Kiley
19 wrote there about improving the plan to make employees happy,
20 right?

21 A. Right.

22 Q. Nothing about lump sums, correct?

23 A. Not on that page, no.

24 Q. You understood the task at hand from Barry, conveying the
25 edict, as you called it, from Roger and Dale, which was to cut

F7LJOSB6

Peck - cross

1 costs, not improve the plan to make it more pleasing to
2 participants, right?

3 A. Right.

4 Q. So these presentations in your declaration, Paragraph 8,
5 you say that Kiley prepared the presentations. You say that he
6 had assistance from Mercer, but it was Kiley who was the main
7 person presenting this information creating these decs. Is
8 that fair?

9 A. I think Carol had something to do with it also in the
10 routine.

11 Q. I am not trying to be nitpicky, but in Paragraph 8 of your
12 declaration, you say to assist you in these discussions, we
13 used presentation materials that were prepared by Mr. Kiley,
14 with assistance from Mercer.

15 A. Ah-huh, but that doesn't mean that Carol didn't have any
16 input into it.

17 Q. That is fair.

18 So you, in your opinion, Carol knew what she was doing
19 pension-wise? She was sophisticated?

20 A. Well, not as much as Tom, but, yes.

21 Q. Okay. So if you had to blue pencil this, would you now say
22 that we used presentation materials that were prepared by
23 Mr. Kiley, with assistance from Carol Kanowicz and Mercer? Is
24 that more accurate?

25 A. Okay, yes, I think so.

F7LJOSB6

Peck - cross

1 THE COURT: In about five minutes we'll take our
2 mid-afternoon break, all right?

3 BY MR. GOTTESDIENER:

4 Q. While we have Mr. Kiley's dec, the one he wrote on handy,
5 would you turn to it, it should be the last page of that
6 Exhibit PX-632, it has got the Bates number 2472 on it. Do you
7 see where it says comparison of plans?

8 A. Yes.

9 Q. And there may be a staple in the way in the page where you
10 can -- or you can look up on the monitor, but do you see that
11 he wrote in, "We looked at many variations of cash balance
12 formulas"?

13 A. Yes, I see it.

14 Q. Is that true?

15 A. Probably. I am sure that the committee looked at a number
16 of things, yes.

17 Q. The committee in this case, you're referring to the task
18 force, not the retirement --

19 A. Yes, the task force.

20 Q. Is it true what he writes in the next line, "We chose this
21 formula because of the level of savings it provides and because
22 it is service-based which is appropriate based on the emerging
23 demographics of our company, i.e., younger and more mobile"?

24 A. Yes.

25 Q. So that is true, too? Is that right?

F7LJOSB6

Peck - cross

1 A. Why would he write it if he wasn't?

2 Q. I am sorry about these questions. These are legal
3 questions.

4 THE COURT: Let me make sure the witness understands
5 what the question is intended to do.

6 Do you believe that it is a correct statement that the
7 formula that's reflected in PX-632 as the recommended formula
8 was chosen because of the level of cost savings it provided and
9 because it is service-based, which was appropriate based on the
10 emerging demographics of the company?

11 THE WITNESS: Yes.

12 THE COURT: Thank you. You you may proceed, Mr.
13 Gottesdiener.

14 BY MR. GOTTESDIENER:

15 Q. There is nothing there about lump sums, we chose this
16 formula because of lump sums? You agree, right?

17 A. It is not there, right, but it was discussed, many, many
18 times.

19 Q. Lump sums?

20 A. Yes, because it was part of what we were attempting to do
21 was to make this attractive to the participants, and the way
22 that would be is if they could take a lump sum, then they don't
23 have to wait until their retirement age.

24 Q. Well, that offering of a lump sum, now that you've brought
25 that up, was attractive to the company?

F7LJOSB6

Peck - cross

1 A. And to the associates.

2 Q. Right. Let me ask you about the attractiveness of the lump
3 sum to the company. That was the way you understood the
4 company was going to get even more savings, correct?

5 A. I wouldn't say even more. They were going to get savings
6 because of the things that having people out of the plan, the
7 benefits of having fewer people in the plan.

8 Q. The reason that was an especial benefit to get people out
9 of the plan was because there was a very expensive early
10 retirement subsidy?

11 A. Yes.

12 Q. That you knew about?

13 A. Yes.

14 Q. And you knew that that was expensive to Woolworth, right?

15 A. Yes.

16 Q. And that was something you you learned with lots of numbers
17 through Mercer and Tom Kiley in the course of the review?

18 A. Ah-huh.

19 Q. Yes?

20 A. Yes.

21 Q. And one of the objectives of going in this direction was to
22 eliminate the early retirement subsidy?

23 A. Yes.

24 Q. And you mentioned that enhancement? Do you remember that
25 was brought up?

F7LJOSB6

Peck - cross

1 A. The enhancement, right.

2 Q. The enhancement was effectively to replace the early
3 retirement subsidy for people who were close to retirement age?

4 A. 50 years plus 15 years of service, right.

5 Q. So it is yes, essentially the enhancement was to replace
6 the early retirement subsidy that was going away?

7 A. Yes.

8 THE COURT: All right. I think it is now a good time
9 to take break.

10 MR. GOTTESDIENER: Could I finish one or two questions
11 and then I will be done?

12 THE COURT: Yes.

13 BY MR. GOTTESDIENER:

14 Q. And you understood and the company understood that the more
15 people who took lump sums, the less people who would be
16 receiving this early retirement subsidy because it had to be
17 elected in the form of an annuity?

18 A. Can you ask that question again, please.

19 Q. Sure. The early retirement subsidy, to get the benefit of
20 it the way the plan was administered, if there was a lump sum
21 taken, the subsidy was not included in the calculation of the
22 lump sum, it was only included in the annuity?

23 A. Right, right.

24 Q. So you understood that the more people who took lump sums,
25 the less people would be receiving the early retirement

F7LJOSB6

Peck - cross

1 subsidy?

2 A. Right.

3 Q. And so it was the strategy also to save money to get people
4 to take lump sums rather than take the early retirement subsidy
5 annuity?

6 MR. RUMELD: Objection.

7 THE COURT: You can answer it. Overruled.

8 A. I don't know that it was a strategy, but it was a result
9 of, you know, what we did, yes.

10 BY MR. GOTTESDIENER:

11 Q. Page 329, this is the last question, your Honor, 329 line
12 19:

13 "Q So it was the strategy also to save money to get people to
14 take lump sums rather than take the early retirement subsidy
15 annuity?

16 "A Yes."

17 You gave that testimony, right?

18 A. Yes, I did.

19 MR. GOTTESDIENER: Thank you.

20 THE COURT: Let's take our mid-afternoon break, folks,
21 and come back in 10 or 12 minutes.

22 (Recess)

23 THE COURT: Let's all be seated. Mr. Gottesdiener,
24 you may proceed.

25 MR. GOTTESDIENER: Thank you.

F7LJOSB6

Peck - cross

1 BY MR. GOTTESDIENER:

2 Q. Ms. Peck, the May 1 decs that you have in front of you, the
3 one you wrote on and Mr. Kiley wrote on, who made the
4 presentation? Was it you or Mr. Kiley or some combination of
5 the both, if you remember?

6 A. It was probably a combination, but I don't remember
7 exactly.

8 Q. If you turn to the page that has review of plan
9 alternatives on it, that's just a couple of pages in, you can
10 use the PX-10.

11 A. Yes.

12 Q. So all these alternatives, they show, starting off with
13 leaving the current plan unchanged, do you see that there?

14 A. Yes.

15 Q. Then there's other alternatives listed below.

16 Why don't we just review them quickly so we can talk
17 about them quickly. There is leaving the current plan
18 unchanged and then there is a column that has pros and cons and
19 the estimated cost of doing that, correct?

20 A. Yes.

21 Q. And then underneath, the other alternatives, they show
22 terminate the current plan, freeze with intent to terminate,
23 freeze temporarily, change the current plan formula, reduce it
24 to 1 percent of W-2 compensation, and then the last is convert
25 to the cash balance plan with the formula that, as Mr. Kiley

F7LJOSB6

Peck - cross

1 noted, was the one that saved the most money?

2 A. Ah-huh.

3 Q. Right, those are the alternatives?

4 And the pros and cons are discussed, all of them
5 except for termination, they all cut costs, right?

6 A. Yes.

7 Q. As compared to the 26.1. Is that right?

8 A. Yes.

9 Q. Do you see that?

10 A. Yes, I see it.

11 Q. Now, the one that saved the most money if it were chosen
12 was the temporary freeze. Is that right? Do you see how that
13 estimated cost drops to 16 million per year?

14 A. Yes, I see it.

15 Q. Now, the cons that are listed in doing that, permanent loss
16 of retirement benefits, loss of associate morale and
17 confidence, negative publicity.

18 Do you agree that that is what was explained to senior
19 management?

20 A. Yes, I do.

21 Q. Now, why would a temporary freeze, why would that cause a
22 morale problem?

23 THE COURT: Let's put it more permanently.

24 What was your understanding as to why the temporary
25 freeze, as reflected on this page, was viewed as having the

F7LJOSB6

Peck - cross

1 disadvantage of having a loss of associate morale and negative
2 publicity?

3 THE WITNESS: Why was it viewed that way?

4 THE COURT: Yes.

5 THE WITNESS: I think because of the first part of
6 that column that says a permanent loss of retirement benefits.
7 That would definitely be a negative.

8 Also at this time we were thinking about the fact that
9 we were turning over a lot of people, so we would be hiring new
10 people and we didn't want to tell them that -- we didn't want
11 to have to tell them that we didn't have a pension plan, our
12 pension plan was frozen.

13 THE COURT: Thank you.

14 THE WITNESS: You're welcome.

15 BY MR. GOTTESDIENER:

16 Q. You would agree that telling current employees that the
17 company is temporarily freezing benefits because the company's
18 in tough shape would really be a morale killer?

19 A. Yes, I agree.

20 Q. And at the time there was a lot in the newspapers and
21 industry publications about companies freezing pension plans in
22 1995, and in 1995 it was not put in a very positive light,
23 correct?

24 A. I agree.

25 MR. RUMELD: Objection.

F7LJOSB6

Peck - cross

1 THE COURT: Overruled.

2 BY MR. GOTTESDIENER:

3 Q. You were concerned that that route, going that route,
4 vendors, your customers, they could decide that they didn't
5 want to patronize a store that would do that to people, freeze
6 their benefit, correct?

7 A. That's correct.

8 Q. And the negative publicity, you agree, the reference in the
9 cons there also was referring, thinking about somebody who was
10 at J.C. Penney, for example, who might otherwise be thinking
11 about joining Woolworth, that would be negative for recruiting
12 those new employees, as you mentioned to her Honor, correct?

13 A. Yes.

14 Q. Do you remember in the deposition we actually spent some
15 time talking about some of these HR concepts in your
16 experience, and I was asking well, what about the option of
17 doing a temporary freeze of current employees' benefits so you
18 could still recruit new people, still tell them that they could
19 earn a pension? Do you remember we discussed that?

20 A. Yes, I do.

21 Q. Not to put too fine a point on it, you in effect told me
22 that that was crazy, right?

23 A. I did.

24 Q. Does it refresh your recollection, I said if you told
25 people that we were freezing your pension, that that would -- I

F7LJOSB6

Peck - cross

1 am sorry -- Page 190 line 5 --

2 THE COURT: You need to, before you can impeach her,
3 you have got to get testimony that is inconsistent.

4 MR. GOTTESDIENER: I am actually not impeaching but
5 refreshing recollection.

6 THE COURT: She hasn't had a recollection in terms of
7 the last question, right?

8 MR. GOTTESDIENER: You're absolutely right.

9 BY MR. GOTTESDIENER:

10 Q. You remembered that I brought up that possibility, and you
11 looked at me like I was crazy, and then you explained why that
12 that would just be a non-starter. Is that fair?

13 MR. RUMELD: Objection.

14 THE COURT: Overruled.

15 A. Yes, that is fair.

16 Q. What you told me was that if you told people who were
17 currently at the company that you're freezing their benefits
18 because the company is going through a rough patch, but you
19 were telling people who you're trying to recruit you had a
20 pension, that they would have a pension, in your words, you
21 said that would be a kick in the face?

22 A. To the people who were already employed, yes.

23 Q. And that even if they felt that they were job-locked and
24 they had no place to go, that would be a kick in the face and
25 the result would be that morale would plummet?

F7LJOSB6

Peck - cross

1 A. I agree with that.

2 Q. That was just not an acceptable option?

3 A. Right.

4 Q. Now, under the next alternative, change the current plan
5 formula to 1 percent of W-2 compensation, it also has the same
6 cons. You understood the formula without getting too
7 technical, the formula was on a blended rate, to simplify it,
8 it was 1.5 percent. Is that fair?

9 A. Ah-huh.

10 Q. And this option was looking to dropping it down to 1
11 percent?

12 A. Yes.

13 Q. So that would not have saved as much money as the freeze,
14 the temporary freeze, but it would have saved some money.

15 That was rejected or deemed not desirable. Using the
16 same cons, wouldn't there be a permanent loss of retirement
17 benefits, but there would also be a loss of associate morale
18 and confidence and negative publicity. Is that right?

19 A. That is what it says, sir.

20 Q. And you agreed with that because if you're reducing the
21 formula across the plan, and you're still leaving the plan in
22 place, it is not something that would be missed by people,
23 they'd have to be told flat-out now the formula is reduced. Is
24 that fair?

25 A. Yes, it is fair.

F7LJOSB6

Peck - cross

1 Q. By the way, you understood this lump sum was something
2 that -- withdrawn.

3 You know that people already who had small amounts who
4 left the company before the conversion, that there were
5 actually quite a lot of people who got cash-out lump sums?

6 A. Yes.

7 Q. You knew it was an option for the company to simply expand
8 the definition of those people and allow a larger number of
9 people to receive their benefit in the form of a lump sum just
10 through an amendment?

11 A. You mean more than, if they had more than 3500?

12 Q. Yes, they would have an option as opposed to something that
13 was forced upon them? A lump sum option could have been
14 delivered through the existing plan, you agree with that? You
15 understood that?

16 A. Yes.

17 Q. So you could have coupled a decrease in the formula with
18 the lump sum option?

19 A. That's one thing we could have done, sure.

20 Q. Now, under the cash balance alternative, you see that it
21 has the permanent loss of retirement benefits, right?

22 A. I see it.

23 Q. The wear-away freeze was going to mean for a period of
24 years people were not going to be earning anything, correct?

25 MR. RUMELD: Objection.

F7LJOSB6

Peck - cross

1 THE COURT: Overruled.

2 BY MR. GOTTESDIENER:

3 Q. The permanent loss of retirement benefits is a reference to
4 the wear-away freeze, correct?

5 A. Right.

6 Q. But there is no reference there to loss of associate morale
7 and confidence or negative publicity for that alternative? You
8 see that, right?

9 A. I see that.

10 Q. So you do agree that the effect of the wear-away was a
11 freeze, just by another name, right? It is the same as a
12 temporary freeze, the option that is above, correct?

13 A. Yes.

14 Q. So that says there is going to be a loss of associate
15 morale and confidence and negative publicity because that also
16 would be something that would be not easily missed? It would
17 have to be something that would be announced, correct?

18 A. Right.

19 Q. So the reason why loss of associate morale and confidence
20 or negative publicity is not in the cons column for cash
21 balance is because you understood, and your team understood,
22 that the difference would be from the temporary freeze, that
23 with the conversion and its complexity, people would recognize
24 the temporary wear-away freeze as a freeze?

25 MR. RUMELD: Objection.

F7LJOSB6

Peck - cross

1 Q. Correct?

2 THE COURT: Overruled. She can answer.

3 A. Can you repeat that, please.

4 BY MR. GOTTESDIENER:

5 Q. Sure. The only difference was that with the conversion and
6 its complexity --

7 A. Right.

8 Q. -- people would recognize the temporary wear-away freeze as
9 a freeze?

10 A. That's correct because we didn't think of it as a freeze.

11 Q. I understand, but my question is focused on why the cons of
12 loss of associate morale and confidence are not there, negative
13 publicity is not there?

14 A. Right.

15 Q. The reason is that with the conversion versus the old plan,
16 just temporarily freezing it, the employees would have known
17 that the old plan being temporarily frozen under that option up
18 there, but with the cash balance wear-away freeze, that was
19 going to be mixed in with all of the conversion complication.

20 Is that fair?

21 MR. RUMELD: Objection.

22 THE COURT: Overruled.

23 A. It could, yes, that is fair.

24 Q. That is how you all perceived it at the time? I am not
25 asking a new question. I want the record to be clear, that's

F7LJOSB6

Peck - cross

1 why -- that is how you all made a distinction between those two
2 kinds of freezes?

3 MR. RUMELD: Objection.

4 THE COURT: Sustained.

5 BY MR. GOTTESDIENER:

6 Q. That's the only difference between those two kinds of
7 freezes?

8 A. We did not think of the conversion to the lump sums as a
9 freeze. This was a good thing that people could get their
10 money, which they couldn't have done before, so we didn't think
11 of it as a freeze.

12 Q. The freeze temporarily option up there in the middle --

13 A. I see it.

14 Q. -- you could have added a lump, you could have frozen the
15 plan temporarily and said to people listen, we're freezing the
16 plan temporarily for a few years, we hope to be able to restart
17 it, but in the interim, January 1, '96 we are going to give you
18 the right to take your benefit as a lump sum? That could have
19 been done, right?

20 A. As we look at it now, yes, that could have been done.

21 (Continued on next page)

F7lnosb7

Peck - cross

1 Q. And you already told us it could have been done with
2 reducing the rate of the existing plan, just expanding the lump
3 sum option to all participants, right?

4 A. Yes. We can sit here and design another whole plan the way
5 this is going.

6 Q. What I am asking about is how you all designed and decided
7 on this plan. What I am asking, wasn't it significant to you,
8 you have told us already that it was unacceptable, morale would
9 plummet, if you announced a temporary freeze of the whole plan,
10 correct?

11 A. Yes. I think just using the word freeze would have
12 frightened people.

13 Q. OK. But if a softer or gentler word than freeze -- how
14 about for this middle option, Dear Participants, we have to
15 suspend accruals for a period of time because the company is in
16 a rough patch, so we are going to suspend new benefit accruals
17 for a period of time?

18 MR. RUMELD: Objection.

19 Q. You could have done that, right?

20 MR. RUMELD: Objection.

21 THE COURT: Sustained. You need to reask it.

22 BY MR. GOTTESDIENER:

23 Q. The temporary freeze, the middle option --

24 A. Yes.

25 Q. I'm sorry?

F7lnosb7

Peck - cross

1 A. I just said yes.

2 Q. OK. I'm sorry. I thought you were going to say something.

3 That was deemed unacceptable, correct?

4 A. Right.

5 Q. Because of the morale hit?

6 A. Because of the freeze. We were not planning to freeze our
7 plan, and we did not communicate that we were freezing our
8 plan.

9 Q. Right. I'm sorry if I'm losing your following what I'm
10 asking. I am now asking about the temporary freeze option, not
11 the cash balance.

12 A. I understand.

13 Q. OK. The reason that temporary freeze option was
14 unacceptable, or one of the principal reasons was because it
15 would have been a morale killer you told us already, right?

16 A. Yes.

17 Q. And that still would have been the same even if you went to
18 people and said, Listen, let's all band together. We're going
19 through this rough patch. We promise we'll keep it as brief as
20 possible. I asked you those questions in the deposition and
21 you said, No way, we just would not ever say that. We had
22 stores to run and --

23 A. Right.

24 Q. -- a business to operate, is that right?

25 A. That's right.

F7lnosb7

Peck - cross

1 MR. RUMELD: Objection.

2 THE COURT: Overruled.

3 Was that an objection? Was it an objection?

4 MR. RUMELD: Yes.

5 THE COURT: It is hard because your voice for the
6 objections is dropping. I know that you don't want to
7 interrupt, but I just want to make sure that if I make a ruling
8 I'm making a ruling in response to something.

9 MR. RUMELD: I will keep my voice up, your Honor.

10 Sorry.

11 THE COURT: OK.

12 BY MR. GOTTESDIENER:

13 Q. You didn't tell --

14 MR. GOTTESDIENER: I got the answer, right?

15 BY MR. GOTTESDIENER:

16 Q. The way you all operated was you didn't tell the whole
17 company that you were in dire straits?

18 A. Correct.

19 Q. That's not the way you ever operated?

20 A. Not HR, no. I mean --

21 Q. Well, you are not aware of anyone else --

22 A. Certainly when facilities were closed, then they didn't use
23 the word -- they didn't use the words dire straits, but they
24 would have mentioned financial hardships.

25 Q. Now, after this May meeting, we have a July presentation to

F7lnosb7

Peck - cross

1 the chairman's group?

2 A. OK.

3 Q. Do you remember that?

4 A. Uh-huh.

5 Q. So this happens July 19. That is PX 101. We looked at
6 this together in your deposition. There is a cover memo, July
7 19, and a July 20 deck.

8 MR. GOTTESDIENER: With the Court's indulgence.

9 Q. I just want to make sure you have a hard copy in front of
10 you, in case that's handy.

11 MR. GOTTESDIENER: May I approach, your Honor?

12 THE COURT: Yes.

13 BY MR. GOTTESDIENER:

14 Q. This is PX 101.

15 A. OK. Thank you.

16 Q. You see that has your signature, Pat, on the front?

17 A. Correct.

18 Q. It's directed to Roger, Dale, Barry, Gary Bahler. That's
19 the general counsel you mentioned earlier?

20 A. Yes.

21 Q. And Rina Zimmerman?

22 A. Right.

23 Q. And she is a --

24 A. Benefits attorney who was employed by Foot Locker,
25 Woolworth.

F7lnosb7

Peck - cross

1 Q. And it's copied to Carol and Tom, right?

2 A. Right.

3 Q. It says, Attached is your copy of the information that's
4 been prepared regarding changes to our retirement plans, and
5 you mention the meeting scheduled for the following day.

6 This copy is attached to the memo -- if you just flip
7 through it, you can see this has a lot of Mr. Kiley's
8 handwriting?

9 A. Yes.

10 Q. Can you tell us whether you or he or you and he made the
11 presentation?

12 A. Well, given that this has all of his notes on it and not
13 mine, I would say that he made the presentation, but I don't
14 remember exactly. But that's the logical, you know, output of
15 him making all the notes and not me.

16 THE COURT: Let me ask you, in terms of typical
17 practice, was it typical for you to receive from Mr. Kiley
18 materials which might be in PowerPoint form but have his
19 handwritten notes on it for the purpose of allowing you to make
20 a presentation that included his notes? In other words --

21 THE WITNESS: I know --

22 THE COURT: -- did he mark up the power point for you?

23 THE WITNESS: I understand what you're asking me.

24 I wouldn't say it was typical. I would say that he
25 would give me the presentation, and then we would sit and

F7lnosb7

Peck - cross

1 discuss it and go through it and then I would make my own notes
2 on it.

3 THE COURT: I see.

4 THE WITNESS: Yes.

5 THE COURT: OK. Thank you.

6 THE WITNESS: You're welcome.

7 BY MR. GOTTESDIENER:

8 Q. So, without speculating, this seems to be more consistent
9 with him doing the presentation than with you?

10 A. Right, yes.

11 Q. And this is a pretty detailed document, including a lot of
12 financial information. I think you would agree, if you would
13 turn to pages the Bates numbered pages 10-11, that would be
14 4410, 4411, where it has estimated costs, cash balance?

15 A. Uh-huh.

16 Q. And it shows the cost in a pension sense, and it's got both
17 contributions and FAS87 reporting expense?

18 A. Yes.

19 Q. You see that he's detailed in the notes savings with and
20 without the 401(k) plan?

21 A. Yes.

22 Q. A general question, in the savings here that are listed,
23 while they may add up for a few years, the company was a
24 multibillion dollar corporation, right?

25 A. Yes.

F7lnosb7

Peck - cross

1 Q. With annual sales in the billions of dollars, right?

2 A. Yes.

3 Q. You did tell us that this was a big item for Roger and Dale
4 because it affected all participants, all employees?

5 A. Yes.

6 Q. This seems to suggest a high level of involvement by Roger.

7 A. Uh-huh, yes.

8 Q. Is that how you remember it?

9 A. Yes, I do.

10 Q. And was he generally a hands-on kind of CEO?

11 A. Through -- well, he was hands on, but it was through his --
12 through Dale and Barry, not that he would directly come to me
13 on a regular basis.

14 Q. So, outside of these meetings, that's how you would
15 interact with him? It would be through Barry and Dale?

16 A. Right.

17 Q. And they were themselves detail oriented?

18 A. Yes.

19 Q. Interested in a lot of the numbers?

20 A. Yes.

21 Q. And in the meetings themselves, when you were in meetings
22 with Roger as well as Dale and Barry, are all these notes
23 consistent with the way the meetings would be conducted, that
24 Roger would want to know the details?

25 A. Yes.

F7lnosb7

Peck - cross

1 MR. GOTTESDIENER: With the Court's indulgence.

2 Q. Looking at these pages, you can see savings listed on Bates
3 004400, the recommendations page.

4 If you see under the first bullet point, it explains
5 the proposed changes, and at the second to bottom inset dash
6 you see it says, Reduces future benefit accruals and lowers
7 future costs.

8 A. Yes.

9 Q. And then the next page has, benefit illustrations -
10 retailers, meaning competitors.

11 Do you see that?

12 A. Yes.

13 Q. And then after that, when it shows review of defined
14 benefit plan alternatives.

15 MR. GOTTESDIENER: Next page, please.

16 Q. Do you see it looks at the alternatives we looked at in the
17 last one, but it actually has a lot of expanded alternatives.
18 It's still looking at at least considering what the impact
19 would be of these changes of no change, terminate plan, freeze
20 plan with intent to terminate, freeze plan temporarily. But
21 then do you see under E, F, G, H, and I, that there seems to be
22 expanded consideration of -- I was the one we looked at before
23 in terms of keeping the same plan structure, but lowering the
24 right of accrual. E, F, G, H, you would agree these are
25 permutations on that that are being analyzed?

F7lnosb7

Peck - cross

1 MR. RUMELD: Objection.

2 THE COURT: Hold on one second.

3 Sustained.

4 MR. GOTTESDIENER: I'll ask it another way.

5 BY MR. GOTTESDIENER:

6 Q. This page is comparable to the page we looked at from the
7 May deck but it seems to have more detail, is that fair?

8 A. Yes.

9 Q. Is that consistent with your recollection and knowledge of
10 the kinds of presentations that Roger Farah and Dale Hilpert
11 wanted when they were needing to make big-item decisions?

12 A. Yes.

13 Q. Then after that it shows, benefit illustrations - cash
14 balance and benefit illustrations for cash balance option L,
15 which I don't think there is a dispute between the parties is
16 the one that was ultimately enacted.

17 After this page do you see that it shows benefit
18 illustrations actually using examples of people and showing the
19 impact of the change on their benefits?

20 A. What page are you on?

21 Q. I am on page 4408. If you look at the screen for a moment,
22 it will help you get oriented. It is the hard copy.

23 A. OK.

24 Q. It's kind of a spreadsheet of --

25 A. Right.

F7lnosb7

Peck - cross

1 Q. It's all surrounded by Mr. Kiley's handwriting. But look,
2 if you would, just take the first example, somebody who is age
3 47.

4 Do you see that?

5 A. Yes.

6 Q. That person has 19 years of service and it gives their pay,
7 it gives the current plan benefit, the cash balance retirement
8 benefit, the cash balance lump sum, the cash balance as a
9 multiple of pay.

10 Do you see in the last columns or the second-to-last
11 columns it has replacement ratios?

12 A. Yes.

13 Q. You recognize that from your days doing that as that's the
14 percentage of someone's compensation that the plan, once they
15 retire, is replacing through pension, right?

16 A. OK, yes.

17 THE COURT: I want to make sure when you say OK that
18 you are not just agreeing with the statement but you actually
19 believe it to be true.

20 THE WITNESS: I do. I believe it to be true.

21 THE COURT: OK.

22 BY MR. GOTTESDIENER:

23 Q. Let's just take this gentleman.

24 Do you see -- I'm sorry. I shouldn't have said that.
25 This person. This person at age 55 under the current plan, the

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Peck - cross

1 replacement ratio if they retire at that point in time, current
2 plan they're getting a 10 percent replacement ratio. Do you
3 see that, when that person is at age 55? Can you find the --

4 A. I have the 55.

5 Q. And then if you go over --

6 A. OK.

7 Q. I am not talking about the second entry. I am talking
8 about the entry for the person who is currently age 47, the
9 first person.

10 A. I see. OK. Yes. I'm there.

11 Q. Then you go all the way over.

12 A. Uh-huh.

13 Q. What do you find is the current plan replacement ratio?

14 A. 10 percent.

15 Q. And then what do you find that you all were telling Roger
16 was going to be the replacement ratio if you went to cash
17 balance?

18 A. 5 percent.

19 Q. So it's half?

20 A. Yes.

21 Q. So fair to say -- let's just look quickly at age 60. Do
22 you see age 60. It's 16 percent.

23 What is it under cash balance?

24 A. 8 percent.

25 Q. So you don't have any doubt that Roger knew clearly that

F7lnosb7

Peck - cross

1 going with cash balance was cutting benefits?

2 A. Well, I can't answer for him. I don't know how he thought
3 about it. But I mean I know what the numbers say.

4 Q. You know that when you were in meetings with him he paid
5 attention?

6 A. Yes, he did.

7 Q. He was clearly downloaded on the fact that this proposal
8 was going to cut benefits? You can't get inside his head, but
9 you know that he was clearly shown and told this was cutting
10 benefits, fair?

11 A. Yes.

12 Q. So after the chairman's group meets --

13 A. But this isn't the whole picture. This is just the pension
14 part of it.

15 Q. You are talking about adding the 401(k)?

16 A. Right.

17 Q. You agree that the company at that time was not competitive
18 with its other retailers insofar as the pension plan was not a
19 rich pension plan and you had no 401(k) plan?

20 A. Yes.

21 Q. And you agree that essentially the 401(k) plan, whatever
22 was going to go on, was a must that you had to have?

23 A. Yes.

24 Q. Competitively you needed it one way or another?

25 A. Yes.

F7lnosb7

Peck - cross

1 Q. So after the chairman's group you would agree gives the
2 thumbs up to then presenting this to the retirement investment
3 committee of the board and ultimately the board, that is what
4 happened, that versions of this presentation were then in
5 August made to the retirement investment committee and then in
6 September to the full board?

7 A. Uh-huh, yes.

8 Q. OK. So let me just show you very quickly PX 19.

9 MR. GOTTESDIENER: May I approach, your Honor?

10 THE COURT: Yes.

11 MR. GOTTESDIENER: So this is August 8.

12 Your Honor has a copy?

13 THE COURT: I do.

14 THE WITNESS: Thank you.

15 BY MR. GOTTESDIENER:

16 Q. So, if you would just thumb through that, I think you will
17 agree that this is a variation with your handwriting of the
18 same presentation that was made to the chairman's group.

19 A. Yes.

20 Q. And if you would just look briefly, it includes the same
21 explanation that it is cutting benefits and it's showing dollar
22 savings?

23 A. Yes.

24 Q. And you see that the presentation -- let me show you the
25 minutes that accompanied these.

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Peck - cross

1 MR. GOTTESDIENER: May I approach?

2 THE COURT: Yes.

3 BY MR. GOTTESDIENER:

4 Q. PX 147, ma'am, are minutes of the retirement investment
5 committee meeting?

6 A. Uh-huh.

7 Q. If you would just confirm that at the meeting you were
8 present but it appears that it was Barry who actually did the
9 presentation?

10 A. I can confirm that.

11 Q. And then you sent a memo to the board after this, the
12 entire board, on August 22, that is PX 91 that I will show you,
13 in anticipation of a September 13 board meeting.

14 Does that sound right to you?

15 A. Yes.

16 THE COURT: PX?

17 MR. GOTTESDIENER: PX 91 is the memo to the board, and
18 PX 40 is the presentation to the board.

19 There's one more PX, PX 37, which is the minutes of
20 the board's meeting on September 13.

21 THE COURT: Sorry. Is it PX 91? PX?

22 MR. GOTTESDIENER: 40 and PX 37.

23 THE COURT: All right. Thank you.

24 MR. GOTTESDIENER: May I approach, your Honor?

25 THE COURT: Yes.

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Peck - cross

1 MR. GOTTESDIENER: With the Court's indulgence.

2 BY MR. GOTTESDIENER:

3 Q. This August 22 document is a memo that you sent that covers
4 a deck. It's sent to all of the board members. It's
5 effectively mailed to their homes or their work?

6 A. Right.

7 Q. And it's for them to read in anticipation of the meeting
8 the following month, is that fair?

9 A. That's fair.

10 Q. At the actual meeting there is another copy for them if
11 they didn't happen to bring theirs, right?

12 A. Right.

13 Q. You are enclosing, as you say, an abbreviated form of the
14 presentation --

15 A. Uh-huh.

16 Q. -- made to the members of the retirement investment
17 committee on August 8. That was the one that Barry made,
18 correct?

19 A. Right.

20 Q. Then Barry also made the actual presentation to the board
21 as far as you are aware, showing you PX 37 and PX 40, on
22 September 13, is that correct?

23 A. Yes. According to the minutes, that's correct.

24 Q. I'm sorry?

25 A. According to the minutes that's correct.

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Peck - cross

1 Q. You were not present?

2 A. No, not in the board meeting.

3 Q. You see that the deck is effectively the same deck, and it
4 shows the benefit reductions, the savings, and the statement
5 that this is going to save money for the company, is that
6 correct?

7 A. Yes.

8 Q. Thank you.

9 It would be fair to say that you liked to put as much
10 as possible a positive spin on news going out to employees
11 about their pay, their benefits?

12 A. Sure.

13 Q. In this case, you knew there needed to be an announcement
14 of the changes that were coming, right?

15 A. Yes.

16 Q. In fact, there was an announcement that went out just two
17 days after the board adopted these recommendations in the form
18 of a binding amendment that was then implemented in January and
19 was formalized later, but the real approval point was on
20 September 13, correct?

21 A. Yes.

22 Q. And two days later an announcement was made about changes
23 to the pension plan and the addition of the 401(k) plan,
24 correct?

25 A. I don't think I have that letter in front of me.

F7lnosb7

Peck - cross

1 Q. I am about to give it to you.

2 A. OK. If you say it was two days later.

3 Q. You see that the board meeting is September 13?

4 A. I do.

5 Q. If we can put on the screen real quick so you can see the
6 date PX 2.

7 MR. GOTTESDIENER: If you could just blow up the top
8 there.

9 Q. This is the announcement letter?

10 A. OK.

11 Q. Do you agree with that? It looks familiar?

12 A. Yes.

13 Q. At the bottom --

14 MR. GOTTESDIENER: If you would just scroll for her
15 benefit.

16 Q. There's Roger signing and Dale signing?

17 A. Right. OK.

18 Q. It's from the both of them?

19 A. Uh-huh.

20 Q. I understand the 401(k) was something that was a positive.
21 It may have been much delayed and something that needed to be
22 done, but the changes to the pension plan I understand there is
23 a lump sum option, but you knew that benefits were going to be
24 reduced under the pension plan, right?

25 A. Yes.

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Peck - cross

1 Q. You knew by that time there was also going to be this
2 transition period that you hoped wasn't going to last too many
3 years, but you did know it was by that time already it was
4 going to last a period of years, right?

5 MR. GOTTESDIENER: Objection.

6 THE COURT: Hold on so that I can read it.

7 Sustained. You've got to rephrase that.

8 BY MR. GOTTESDIENER:

9 Q. You knew in September of '95 that there was anticipated to
10 be a two- to three-year on average wear-away period?

11 A. Yes.

12 Q. During which people would not earn any new benefits, right?

13 A. Well, right. They wouldn't earn new benefits, but they may
14 get more than their cash balance.

15 Q. But they would not get more than they would already be
16 entitled to based on their accrual up to 12/31/95?

17 A. 12/31/95.

18 Q. Right?

19 A. Right, uh-huh.

20 Q. So you knew that the suspension of accruals of new benefits
21 was anticipated last two to three years, right?

22 A. Yes.

23 Q. And you knew also that once people got out of wear-away,
24 you also understood that the rate of benefit accrual for people
25 who were actually out of wear-away was going to be lower than

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Peck - cross

1 it was under the prior plan?

2 A. Yes, I do believe we talked about that, uh-huh.

3 Q. And it's fair to say that as to those pieces of information
4 that you had, given your druthers to put a positive spin on
5 things, you didn't want to tell employees bad news?

6 MR. RUMELD: Objection.

7 THE COURT: Sustained.

8 Q. You didn't want to tell employees bad news about the
9 changes to the plan?

10 THE COURT: Well, I think you need to word that
11 differently. Sustained.

12 BY MR. GOTTESDIENER:

13 Q. You were involved in fashioning the announcement letter
14 that went out, correct?

15 A. Yes. That's correct.

16 Q. You didn't want there to be any bad news communicated in
17 that announcement letter?

18 MR. RUMELD: Objection.

19 THE COURT: Overruled.

20 A. This is a good news letter, and that's how we saw it. So
21 that's what is in here.

22 Q. So you wanted a good news letter going out?

23 A. Roger and Dale wanted a good news letter going out.

24 Q. OK. You did, too, though, right?

25 A. Yes, of course, I did, too, as the HR person.

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Peck - cross

1 Q. So you made a decision to leave out the bad news that we
2 were just talking about?

3 MR. RUMELD: Objection.

4 THE COURT: Overruled.

5 A. Well, it wasn't in the draft that I gave Roger and Dale,
6 that's correct, or Barry, uh-huh.

7 Q. So it's correct that you made a decision to just leave that
8 part out of it, correct?

9 A. Yes. That's right.

10 Q. The letter as it went out when it talked about the change
11 to the pension plan you agree that in the letter --

12 MR. GOTTESDIENER: If we could blow up where it says,
13 The other part of the new retirement benefit program.

14 BY MR. GOTTESDIENER:

15 Q. It says: The other part of the new retirement benefit
16 program provides several changes to the Woolworth retirement
17 plan. These changes will provide participants with more
18 flexibility and a better ability to monitor their benefits.

19 It then says: Each plan participant will have an
20 individual account to which the company will make a yearly
21 contribution. That contribution will be based on a new formula
22 that will reflect percent of pay and years of service.
23 Participants will be able to see their individual account
24 balance grow each year and know its value.

25 Do you see that there, ma'am?

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Peck - cross

1 A. I do.

2 Q. You knew at the time that letter went out that that was a
3 false statement for anyone in wear-away at least?

4 A. For anyone in wear-away.

5 Q. And you knew that everyone was essentially going to be in
6 wear-away 1/1/96, right?

7 A. You think there were some exceptions.

8 Q. Some exceptions. Of about 16,000 people, other than the
9 exceptions, basically everyone was going to be in wear-away.
10 You agree with that, right?

11 A. Basically.

12 Q. So you agree that it is a false statement for somebody in
13 wear-away that they are going to be able to know the value of
14 their account if they are in wear-away? Let me withdraw it and
15 ask it this way. You know that there is no value to the
16 account when you are in wear-away, right?

17 A. Right.

18 Q. And you can't obviously know the value if you are in
19 wear-away without being flat out told you are in wear-away,
20 right?

21 A. Yes. You're right.

22 Q. So if you are not out of wear-away, the account has no
23 value, correct?

24 A. Well, the value is in the 12/31/95 accrual. So that if
25 somebody left, if that was more than what was in the cash

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Peck - cross

1 balance plan, they would get that.

2 Q. Right. So the account would have no value. It would have
3 meant nothing to them?

4 A. Well, that account would -- right. You're right.

5 Q. So you agree --

6 A. But the pension benefit, there still would be a pension
7 benefit.

8 Q. Yes. That was the pension benefit people had already
9 earned as of 12/31/95. That's what you mean, right?

10 A. Correct, uh-huh.

11 Q. So you agree it is a false statement for someone who would
12 be looking at their account balance watching it grow, they
13 would not be able to know its value if they're still in
14 wear-away?

15 A. If they're still in wear-away, that's true.

16 Q. You were involved in the drafting I think you just
17 mentioned before, you said they wanted good news going out,
18 Roger and Dale, correct?

19 A. That this was a good news letter, right.

20 Q. But, as the HR person, you were the point person that they
21 were relying on to get out this good news letter?

22 A. Right.

23 Q. As you told us, you made an affirmative decision to leave
24 out the bad parts, correct?

25 A. Yes. Because they weren't necessarily -- they didn't apply

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Peck - cross

1 to everybody. I mean we talked about this already.

2 Q. You mean --

3 A. There were exceptions.

4 Q. So you left out the bad parts because out of 16,000 people
5 there were some small number of people who were not in
6 wear-away?

7 A. Correct.

8 Q. In discovery -- that's the process before trial where the
9 parties exchange documents -- we got some drafts of the letter.

10 A. OK.

11 Q. Including what the defendants have agreed is a draft that
12 has your handwriting on it?

13 A. OK.

14 Q. That's consistent with your memory, that you were involved
15 in the actual drafting of the letter?

16 A. OK.

17 Q. Like her Honor said, I don't want you just saying OK if you
18 are just agreeing with me.

19 Is that consistent with your memory that you got out
20 your pen and made comments?

21 A. It -- yes. Yes.

22 Q. OK. I will show this to you with leave from the Court.

23 MR. GOTTESDIENER: May I approach?

24 THE COURT: Yes.

25 MR. GOTTESDIENER: PX 25.

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Peck - cross

1 BY MR. GOTTESDIENER:

2 Q. Let me show you PX 25 and ask you if you recognize your
3 handwriting on that document?

4 A. I do.

5 Q. So, if you go down to the third paragraph, in the third
6 paragraph or two-thirds of the way down do you see the sentence
7 that starts, Participants will be able? If you look up where
8 Randall is coloring it in yellow.

9 A. OK.

10 Q. Do you see that sentence?

11 A. Right.

12 Q. That's the sentence that you agreed was a false statement
13 for anyone that is in wear-away?

14 A. In wear-away, yes.

15 Q. You see to the left of it you wrote, Good, with an arrow?

16 A. Right. I see it.

17 Q. Thank you. After this letter went out on September 15,
18 this letter mentioned that there would be more information
19 coming.

20 A. Uh-huh.

21 Q. And the next communication that went out was this
22 highlights memo in November. Do you recall that? PX 4?

23 MR. GOTTESDIENER: Put that on the screen, please.

24 Q. You remember this November memo, right?

25 A. I will have to refresh my mind.

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Peck - cross

1 Q. Sure.

2 A. Because I don't remember it offhand.

3 Q. Is it coming back to you?

4 A. OK. Yes.

5 Q. Maybe what would be helpful to make a final link is if you
6 look at your declaration, because you actually discuss it in
7 several parts of your declaration.

8 A. Uh-huh.

9 Q. In paragraph 16, you say you played a direct role in
10 connection with certain companywide communications.

11 A. Uh-huh.

12 Q. And you first list the September announcement letter and
13 then second you list that memo, the memorandum distributed in
14 November of '95.

15 Do you see that you say that in your declaration?

16 A. Yes.

17 Q. And then you also discuss, in paragraph 19 you talk about
18 how it was reviewed and edited by other people?

19 A. Right. Uh-huh.

20 Q. So, going back to the actual memo, PX 4, that is on the
21 screen, that three-page memo, do you now remember that this was
22 the memo that you are referring to in your declaration that was
23 the next companywide communication that went out about the plan
24 changes?

25 A. I don't remember that this was the next one, but it seems

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Peck - cross

1 logical since November is shortly after September.

2 Q. So you remember the memo; you are just not sure that there
3 wasn't something in between?

4 A. Exactly.

5 Q. So let's just talk about this memo.

6 A. Uh-huh.

7 Q. You see how it says, it starts off, As previously announced
8 by Roger and Dale in their September 15 letter --

9 A. Yeah. Right.

10 Q. -- the company is going to make changes?

11 A. Right.

12 Q. Now, you agree that also when it came time to edit this and
13 get this out that you still, you made an affirmative decision
14 to leave out the bad part of the change?

15 A. This mirrors the other memo, yes, uh-huh.

16 Q. So that is a yes, you made an affirmative decision to leave
17 out the bad part?

18 A. Right.

19 MR. RUMELD: Objection.

20 THE COURT: Overruled.

21 BY MR. GOTTESDIENER:

22 Q. So you agree that wear-away is not in there, not any part
23 of it, correct?

24 A. Correct.

25 Q. You agree the statement in the second paragraph, where it

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Peck - cross

1 says, At termination of employment, provided your vested, you
2 will have the option of taking a lump sum payment equal to your
3 account balance, is a false statement for anyone who is in
4 wear-away?

5 A. For anyone who is in wear-away, yes.

6 Q. It is a false statement for anyone in wear-away because the
7 lump sum payment for everybody who is in wear-away is going to
8 be a payment in excess of their account balance and not tied at
9 all to their cash balance benefit?

10 A. If they are in wear-away, yes.

11 Q. Now, the next communication that went out was referenced --

12 MR. GOTTESDIENER: Actually, if you would just put
13 back on the screen for a moment PX 4. PX 4 references that
14 there will be a plan statement on the first page. Scrolling
15 down a little bit more.

16 BY MR. GOTTESDIENER:

17 Q. Do you see where it says, right there, A statement showing
18 your estimated benefits under the amended plan will be mailed
19 to you during December 1995?

20 A. Yes.

21 Q. And that refreshes your recollection that the next
22 companywide communication about the amended plan was the
23 statement referred to in this memo?

24 A. Would you reask the question again, please.

25 Q. Yes. I'm sorry.

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Peck - cross

1 This says you are going to get a statement of your
2 estimated benefits under the amended plan, right?

3 A. That's what it says, yes.

4 Q. And you know that what happened next was such a statement
5 was prepared and mailed out to people?

6 A. Uh-huh.

7 Q. Correct?

8 A. Yes.

9 Q. And the reason it was estimated was because you didn't have
10 all their compensation for the year?

11 A. Right.

12 Q. You wanted to get people a statement close to 1/1/96, but
13 typically in prior years you didn't get that out until around
14 March because that's when you definitely had everybody's
15 definite compensation, right?

16 A. Right.

17 Q. But in this case you wanted to get --

18 A. Get it out --

19 Q. -- because it was an amended plan you wanted to get that
20 out around 1/1/96, correct?

21 A. Yes.

22 Q. Then you followed that up with a statement that was the
23 actual plan statement in approximately March of '96, correct?

24 A. Yes.

25 Q. And the statement that went out, you were involved in

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Peck - cross

1 supervising the production of that statement, is that right?

2 A. Yes.

3 Q. And you had input into the content of that statement,
4 right?

5 A. Yes.

6 MR. GOTTESDIENER: If we could put on the screen PX 6.

7 Actually could we use PX 23 -- no. The blank version
8 was Deposition Exhibit 23.

9 MR. HUANG: It's PX 43.

10 MR. GOTTESDIENER: PX 43. Can we see if that's right.
11 Excellent.

12 BY MR. GOTTESDIENER:

13 Q. PX 43, at the top you see how it says estimated retirement
14 plan statement as of January 1, 1996?

15 A. Yes.

16 Q. So you recognize this as the statement that did in fact go
17 out around the end of '95, early '96, right?

18 A. Yes. OK.

19 Q. If you look on the left-hand side, it shows current plan
20 and it shows their accrued benefit through 12/31/1995, correct?

21 A. Yes.

22 Q. And then on the right-hand side it shows amended plan as of
23 January 1, 1996.

24 A. OK. Uh-huh.

25 Q. You see that the only thing that it shows as the benefit

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Peck - cross

1 under the amended plan is the account balance?

2 A. You're asking me the account balance, yes.

3 Q. So it doesn't carry over from the current plan, the '95
4 plan on the left-hand side, it doesn't say on the right-hand
5 side, well, you have this greater of, you have an account
6 balance, but you also have your accrued benefit as of 12/31/95,
7 right?

8 A. Yes.

9 Q. It doesn't show that as the benefit under the amended plan,
10 does it? On right-hand side it doesn't, correct?

11 A. Correct.

12 Q. So if you look further at -- where it says your estimated
13 account balance as of 1/1/96, it has a dollar sign?

14 A. Right.

15 Q. And you know that because of the 9 percent rate used and
16 that disconnect between the interest crediting rate and the
17 GATT rate, if somebody was going to actually be paid on 1/1/96,
18 putting aside some small number of people, basically for 16,000
19 people, the account balance would not be the payment that they
20 would receive if they asked for a lump sum on 1/1/96, correct?

21 A. That's possible, right --

22 Q. Well --

23 A. -- that they would get the 12/31/95.

24 Q. They would get the --

25 A. The greater of the two.

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Peck - cross

1 Q. And you know that for basically everybody they would get --

2 A. 12/31/95.

3 Q. -- the 12/31/95 lump sum, correct?

4 A. Right.

5 Q. You also know that for many people that the account balance
6 was given this 9 percent rate that was used to discount plus
7 mortality, in many cases the account balance was half of the
8 actual lump sum that they would have received had they asked
9 for a payment on 1/1/96?

10 A. What's the question?

11 Q. The question is, you knew at the time not only was the
12 account balance not the payment that they would receive as
13 their lump sum, but that the account balance was very
14 frequently very significantly reduced from the amount that they
15 would have received had they asked for their money that day?

16 A. OK. But --

17 Q. Do you --

18 A. I don't know what you are asking me there.

19 Q. You agree with my question, the assertion in my question?

20 THE COURT: No. Let's do it differently. You need to
21 do it differently.

22 MR. GOTTESDIENER: She just wants to know the
23 relevance of it.

24 THE COURT: Right. I'm not going to have you put the
25 relevance as the assertion in your question because it becomes

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Peck - cross

1 confused. So --

2 MR. GOTTESDIENER: I wasn't going tell her the
3 relevance I. Was going to ask her if she agreed.

4 THE COURT: Sustained.

5 BY MR. GOTTESDIENER:

6 Q. You knew that the impact -- at the beginning of my
7 examination you agreed that you knew the impact of using a 9
8 percent discount rate when the GATT rate was significantly
9 lower than that, right?

10 A. Yes.

11 Q. So knew that the opening balance of people that would be
12 shown on their statement was in many cases half or even in many
13 cases even less than half of what they were actually entitled
14 to if they asked for their money that day, right?

15 A. OK. Yes, yes.

16 Q. The statement underneath that dollar sign says, The amount
17 shown above is what you could expect to receive upon
18 termination of employment or retirement if you accrue no
19 further benefits and elect a lump sum form of payment. Right?

20 A. Yes. That's what it says.

21 Q. And you knew at the time for everybody who was in wear-away
22 that that was a false statement?

23 A. For everybody in wear-away, yes.

24 Q. You knew that at the time it went out, correct?

25 A. I don't recall that I knew it at the time. But I know

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Peck - cross

1 that's -- I know it's true.

2 Q. I'm sorry.

3 A. I don't know that I knew it when the statement went out,
4 but I certainly know it to be true.

5 THE COURT: Is that because you don't recall one way
6 or the other what you knew at the time?

7 THE WITNESS: Yeah.

8 THE COURT: OK.

9 THE WITNESS: Back, you know, 20 years ago.

10 BY MR. GOTTESDIENER:

11 Q. But you know we did discuss this in the deposition?

12 Do you recall that?

13 A. Yes.

14 Q. And you know that I asked you if you knew that that was
15 false. Let me withdraw the question and ask it this way.

16 You had that information at the time that the account
17 balance was not the entitlement if somebody asked for their
18 money the next day, the same day, correct?

19 A. Yes.

20 Q. And you were aware that outside counsel proposed edits to
21 this statement that would have made the statement at least not
22 a false statement, correct?

23 A. I didn't know then that they -- because the outside counsel
24 communicated with our benefits attorney most of the time.

25 THE COURT: Who was that?

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Peck - cross

1 THE WITNESS: Our benefits attorney was Rina Zimmerman
2 and outside counsel was Proskauer.

3 THE COURT: All right. I think we should end there
4 for today. It's 5 o'clock.

5 Let's pick up tomorrow at 9 a.m., and we will
6 continue.

7 Is there any housekeeping that people want to raise
8 with me? So we'll get the witness off the stand and then take
9 that up.

10 MR. GOTTESDIENER: I don't think it's necessary, but
11 just a precaution about the admonishment.

12 THE COURT: Well, yeah. I think counsel certainly
13 understands that, but I will tell the witness just for your
14 benefit, since you are probably not a professional trial
15 witness.

16 THE WITNESS: Right.

17 THE COURT: Once you're sworn in under oath, you can't
18 talk with the lawyers who represent anyone in this case, the
19 parties in this case, or any lawyer about this case, about the
20 content of your testimony. If it's about things like what time
21 should you be here and should you wait in the hallway before
22 you come in, obviously you can ask somebody that, but not about
23 the questions and answers.

24 THE WITNESS: OK.

25 THE COURT: All right. Thank you.

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Peck - cross

1 THE WITNESS: Thank you.

2 THE COURT: You can go ahead and step down and let me
3 just see if there's things to take up.

4 MR. RUMELD: I do want to discuss some of the
5 scheduling issues with your Honor.

6 THE COURT: Let's do that. That's exactly what I
7 wanted to find out. So we'll let --

8 THE WITNESS: Do I just leave this here?

9 THE COURT: Leave it all here. You'll pick up where
10 you've left off tomorrow morning.

11 THE WITNESS: OK.

12 THE COURT: All right.

13 So let's discuss some of those logistics. In
14 particular, we will start with, tomorrow is Wednesday. Let's
15 talk about the schedule for tomorrow.

16 I think that the witness should go outside. He'll
17 join you if you want to know about scheduling things tomorrow.

18 OK. Just because we are going to talk about some
19 other witnesses as well.

20 THE COURT: OK. So who is after Ms. Peck? Let's
21 start there until she's out of the room.

22 MR. GOTTESDIENER: I think at this point because we
23 want to not take up the Court's time unnecessarily, we can and
24 we will also -- withdrawn.

25 We can we had three class members we were going to

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Peck - cross

1 call. One is really an HR person, Ellen Glickfield. So we do
2 want to call her. She could be put on after Peck or Mike
3 Steven, who also is the former CFO, but --

4 THE COURT: You may not need Hartman?

5 MR. GOTTESDIENER: Right.

6 THE COURT: It's possible that Hartman will be carved
7 off, and in any event she would be the third of those three.

8 MR. GOTTESDIENER: She would be quick, but I guess we
9 are thinking it could save time.

10 THE COURT: That's fine with me.

11 Are you going to have any opposition to that?

12 Had you relied upon that Mr. Rumeld, where you want to
13 call Ms. Hartman?

14 MR. RUMELD: Well, it was his witness, not mine, but I
15 think then he needs to withdraw the declaration.

16 THE COURT: Obviously the declaration would be
17 withdrawn because the declaration is direct testimony. She's
18 either going to be here for cross or we just take out the
19 direct testimony. It wouldn't be accepted. We haven't moved
20 it into evidence.

21 MR. GOTTESDIENER: We would have no problem with that.

22 THE COURT: All right.

23 Are you ready to strike her right now, or do you want
24 to wait?

25 MR. GOTTESDIENER: I would prefer to confirm it in the

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Peck - cross

1 morning.

2 THE COURT: All right. In the event that
3 Mr. Gottesdiener drops Ms. Hartman, Mr. Rumeld, at this point
4 in time do you have any reason why you would call her in your
5 case separately?

6 MR. RUMELD: I think, given the procedural posture in
7 which this arose, I don't really think I have that discretion.

8 THE COURT: What I want to avoid is, if you are going
9 to make an application for that, then I need to know so I can
10 get a ruling on that.

11 MR. GOTTESDIENER: I can have her here. I don't want
12 to make a speech on this, but there is something I need to say
13 that is in their papers which is an improper missing witness
14 argument.

15 They make the argument --

16 THE COURT: Don't even -- we will address that at some
17 other time, not right now. They make the argument that there's
18 lots of class members --

19 MR. GOTTESDIENER: He's implying the argument right
20 now, your Honor.

21 THE COURT: All right. Then let him make it. If he
22 wants to make the application that he would like to call
23 Hartman then he'll make the application. Let's hear what it
24 is.

25 Is there an application to call Hartman?

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Peck - cross

1 MR. RUMELD: No, your Honor.

2 THE COURT: OK. So Hartman then tomorrow morning
3 you'll let me know if she is struck.

4 MR. GOTTESDIENER: Subject to confirmation, right.

5 THE COURT: If she's struck, the defense is not asking
6 themselves separately to call her.

7 If the plaintiffs choose not to call her, then that's
8 the plaintiff's decision. OK?

9 MR. GOTTESDIENER: Yes.

10 THE COURT: That is separate from any arguments which
11 the defense might make about any number of things. They are
12 not waiving any arguments I think. Just so we are clear, I am
13 not making any determinations about any arguments anybody is
14 making. You guys think about it. You guys talk about it.
15 This is not a discussion it want to have here.

16 MR. GOTTESDIENER: I understand.

17 THE COURT: I am saying this because of the facial
18 expressions.

19 Who is after Ms. Peck, and how much more time do you
20 have with Ms. Peck? We had originally thought she would only
21 be two hours. She's now been a full three.

22 MR. GOTTESDIENER: Yes.

23 THE COURT: I have to say she is extremely forthcoming
24 with you. So I would have thought that you would be able to
25 tie this up, because this is not a witness who's been resisting

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Peck - cross

1 examination.

2 MR. GOTTESDIENER: I agree, your Honor. But I haven't
3 wanted to go too fast, but, yes, I think I can finish in an
4 hour.

5 THE COURT: All right.

6 So an hour more with Ms. Peck in the morning, and then
7 how much, Mr. Rumeld, how much do you think you have going to
8 have with her at this point?

9 MR. RUMELD: I think a couple of hours.

10 THE COURT: OK. So Ms. Peck will be the morning-ish,
11 in that range.

12 Is that about right?

13 MR. RUMELD: I think so.

14 THE COURT: Until about 12:45 or 1 when we break for
15 lunch, which you ought to shoot to try to have her done. I am
16 not going to cut you folks off at this point.

17 MR. RUMELD: I hope so.

18 THE COURT: Then after that, it will be either
19 Ms. Glickfield or Mr. Steven, is that right?

20 MR. GOTTESDIENER: Correct, your Honor.

21 THE COURT: OK.

22 MR. RUMELD: I wanted to hear from Mr. Gottesdiener
23 what his intentions were with my partner, Ms. Ratner, because
24 we had originally talked about her going first thing in the
25 morning tomorrow, and she has some scheduling issues as well.

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Peck - cross

1 THE COURT: You guys talked about that?

2 MR. RUMELD: Mr. Gottesdiener was indicating he might
3 not call her, and I don't know what his intentions are.

4 THE COURT: Are you still thinking of not calling her?

5 MR. GOTTESDIENER: Yes, I'm thinking of not calling
6 her. I am also thinking of not calling Marion Derham.

7 THE COURT: All right.

8 MR. GOTTESDIENER: She is under subpoena, and we can
9 make sure she comes if he wants to call her.

10 THE COURT: All right.

11 MR. RUMELD: Just so we are clear, Ms. Ratner was not
12 one of my witnesses. But I really would like to know today
13 what to tell her about tomorrow.

14 THE COURT: You folks confer about that. Are you
15 ready to say right now whether you are going to call her or
16 not?

17 MR. GOTTESDIENER: I don't think we are going to call
18 her.

19 THE COURT: You are not going to call her. The
20 plaintiffs are not going to call Ms. Ratner.

21 Are you going to call Ms. Ratner?

22 MR. RUMELD: I did not list her as a witness.

23 THE COURT: All right. So Ms. Ratner is off.

24 MR. RUMELD: Ms. Derham is a witness on my list. I do
25 intend to call her, and Mr. Gottesdiener undertook to take care

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Peck - cross

1 of subpoenaing her since she is a class member and we thought
2 that was the appropriate way to proceed.

3 Whether or not Mr. Gottesdiener is planning to call
4 her, as of this time I think we still need her as a witness for
5 our case.

6 THE COURT: All right. Let's see.

7 Live witnesses who the class intends to call. I'm
8 looking for the -- all right.

9 So you folks work out the logistics. Is there going
10 to be any problem with the logistics of getting Ms. Derham
11 here?

12 MR. GOTTESDIENER: No.

13 THE COURT: Are you planning, Mr. Gottesdiener, on
14 subpoenaing Ms. Derham.

15 MR. GOTTESDIENER: She's under subpoena, your Honor.

16 THE COURT: All right.

17 MR. GOTTESDIENER: She is not a witness that we have
18 any control over.

19 THE COURT: My point is somebody has subpoenaed her.

20 MR. GOTTESDIENER: We subpoenaed her, and as long
21 as -- he should just tell me when he wants her here to call
22 her.

23 THE COURT: You guys work that out then.

24 MR. RUMELD: OK.

25 THE COURT: It sounds like she's under subpoena.

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Peck - cross

1 MR. RUMELD: I would just request again for
2 clarification, your Honor, I know your Honor has mentioned
3 about finishing by Monday.

4 THE COURT: Yes. How much time do you need with
5 Mr. Sher?

6 MR. RUMELD: I am not clear what the current count is
7 about the hours.

8 THE COURT: What I had suggested was that you folks
9 confer with each other and with Joe or my clerk about the
10 timing on a periodic basis so you can all keep track of it. I
11 said that the first day.

12 MR. RUMELD: Right. My understanding was that there
13 was a 25-hour limit.

14 THE COURT: There is.

15 MR. RUMELD: Whether we were --

16 THE COURT: There is or we are going -- we will end on
17 Monday. That's why I want you folks -- let's put it this way.
18 Let's level set.

19 How much time do you need, Mr. Rumeld, for Mr. Sher?

20 MR. RUMELD: I think Mr. Sher's direct will take more
21 than half a day and less than a full day. I think your Honor
22 can tell that's Mr. Rachal's bailiwick, not mine. The point
23 I'm trying to make is, I think if Mr. Sher goes on Thursday --

24 THE COURT: He needs to go on Thursday.

25 MR. RUMELD: We will be done by Monday.

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Peck - cross

1 THE COURT: I understand.

2 MR. RUMELD: If your Honor is intending to adhere to
3 the 25-hour limit, I thought I heard yesterday that he was up
4 to 16 hours in the morning yesterday. Maybe I misunderstood.

5 THE COURT: The total I think for all the parties was
6 earlier this week was 16 hours. Am I right?

7 THE LAW CLERK: I don't know about earlier this week.

8 THE COURT: I will talk to you about that in a little
9 bit.

10 MR. RUMELD: I just think that there's been a lot
11 plaintiff's examination.

12 THE COURT: I understand.

13 That is exactly why I said earlier today if we are
14 going to run into issues where people don't think we can get
15 done by Monday I need to surface, because a lot of witnesses
16 are overlapping, so it is hard for me personally to judge how
17 much you folks are going to have with the same witnesses

18 MR. RUMELD: Right.

19 THE COURT: You are in the best position to know if
20 you are likely to run out of time. If there's unfairness, we
21 will adjourn and come back in September. I would rather not do
22 that. That's why I'm saying I want to finish this on Monday.

23 That requires I think, Mr. Gottesdiener, you end
24 tomorrow at the end of the day.

25 MR. GOTTESDIENER: We can end before the end of the

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Peck - cross

1 day.

2 THE COURT: All right. Terrific.

3 MR. GOTTESDIENER: We do --

4 THE COURT: That way Sher can go on.

5 MR. RUMELD: I need to finish Ms. Derham, and
6 Mr. Gottesdiener needs to finish his cross of Ms. Derham.

7 THE COURT: It's really, Mr. Gottesdiener, you and
8 your time because you have had more time than Mr. Rumeld.

9 If you guys want a decision before November, you are
10 going to need to end it Monday. Otherwise we are going to have
11 to pick up in September because I have another trial right
12 behind you and then I've got all kinds of criminal things after
13 that. I have a potential four-week trial actually in September
14 I should say that I learned about this morning.

15 So I either have a two-week trial or a four-week
16 trial, one of the two. They both seem to be going.

17 Bear this in mind.

18 MR. GOTTESDIENER: We've already bore it in mind.

19 THE COURT: I am not going to cut off Mr. Rumeld if
20 there's unfairness in it. I am going to let him put on his
21 case. So we're trying to balance things.

22 MR. GOTTESDIENER: There's also, we may need to move
23 into evidence a lot of documents.

24 THE COURT: We can do that on paper.

25 MR. GOTTESDIENER: Fine.

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Peck - cross

1 THE COURT: I am not worried about the logistics
2 because we have all got a pretty good sense as to what's been
3 shown. OK?

4 MR. GOTTESDIENER: OK.

5 THE COURT: I am only concerned about live testimony.

6 OK, folks. So let's pick up tomorrow morning at 9
7 a.m. and see where we are at the end of the day. We will know
8 a lot more by the end of day, but let's try to keep it short on
9 the plaintiff's side.

10 Thank you.

11 MR. GOTTESDIENER: Thank you.

12 (Adjourned to Wednesday, July 22, 2015, at 9 o'clock
13 a.m.)
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